

The National Hockey League and Salary Arbitration: Time for a Line Change

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Mediate Damn it.¹

The end crowns all,
And that old common arbitrator, Time,
Will one day end it.²

I. INTRODUCTION

On February 16, 2005 the National Hockey League (NHL or League) became the first professional sports league in North America to ever cancel an entire season on account of a labor dispute.³ Three-hundred and one icy days of bitter conflict—the longest labor dispute in North American professional sports history—finally ended on July 13, 2005 with a new collective bargaining agreement (CBA) between NHL players and owners.⁴ Much of the excitement surrounding the end of the lockout focused on the League's new rules of play, which the owners hope will promote scoring,

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¹ *Fans Share Feelings with Daly, Lites*, A.P., Nov. 10, 2004, available at <http://sports.espn.go.com/nhl/news/story?id=1915737#>. This was the message on a sign hoisted by a disgruntled fan at a "town-hall meeting" with NHL fans from the Dallas area, Dallas Stars President Jim Lites, and the NHL's head negotiator Bill Daly. The NHL held several of these "town meetings" to drum up support from loyal fans during the locked-out season of 2004–05. *Id.* The five-month negotiations between the League and the players' association (NHLPA) eventually failed, and the NHL cancelled the remainder of the 2004–05 season on February 16, 2005. Dave Molinari, *No Labor Peace for NHL: Talks Fizzle Again; From Here On, All Efforts to be Directed at Next Season*, PITTSBURGH POST-GAZETTE, Feb. 20, 2005, at C-1.

² WILLIAM SHAKESPEARE, *TROILUS AND CRESSIDA* act 4, sc. 5.

³ Bob Foltman, *Hockey May Rise from Grave*, CHI. TRIB., Feb. 19, 2005, § 3, at 1.

⁴ *Rev Up the Zamboni*, TORONTO STAR, July 14, 2005, at A20. The end of the lockout was a long-time coming, as players and owners expressed their desire to simply get the game back on the ice. *Id.* "To be totally honest, I really don't care what the deal is anymore," Philadelphia Flyers player Jeremy Roenick said. "All I care about is getting the game back on the ice." *Id.*

speed, and excitement in the game.⁵ In an effort to put the 2004–05 lockout firmly in the League's past, the NHL also unveiled a new logo.⁶

While an offense-friendly rulebook and a fresh look will help bring back some excitement to a League that has lost its luster, low-scoring games and a logo reminiscent of the 1970s did not cause the NHL's labor lockout or its financial woes.⁷ Although the NHL has traditionally enjoyed its status as one of North America's four major professional sports leagues,⁸ the NHL has

⁵ Helene Elliott, *New Game for the NHL*, L.A. TIMES, July 23, 2005, at D1. Some highlights of the new rules include: no more ties (shootouts will be played until there is a winner), a larger offensive zone (goals will be closer to the boards and the neutral zone will be reduced), a bigger shooting area in the goal (goaltenders' pads, gloves, and other equipment will be reduced in size), and fewer slowdowns (officials will show "zero tolerance" to interference, hooking, and holding obstruction by defenders). *Id.* at D9.

⁶ *Id.* The new logo has the same shield used in the previous NHL logo, but it is now silver and white. *Id.*

⁷ It is difficult to distinguish between the League's desire to update the game's rules and its fervent pleading with fans to return. See Tim Tucker, *Image, Scoring Require a Boost: The New NHL; League Outlines Plans to Increase Offense and Accessibility in Hopes of Coaxing Fans to Return after Costly, Unprecedented Lockout*, ATLANTA J.-CONST., July 24, 2005, at 1E. Fans' support of the NHL no doubt supplies cash to the League for it to operate and pay its players. However, disagreement over how the League divides that money between its owners and players caused the 2004–05 labor dispute.

⁸ Of all of the professional sports leagues in North America, the National Football League (NFL), the Major League Baseball (MLB), the National Basketball Association (NBA), and the NHL gross the highest revenue. See Ted Kulfan, *Comparing the Leagues' Financial Arrangements*, DETROIT NEWS, Oct. 13, 2004, at 6G. The above list is in order of estimated annual revenue, with the NFL grossing the greatest amount and the NHL hanging on at the bottom of the list. Although the NBA and the NHL include "national" in their proper names, these two leagues have franchises in both the United States and Canada. NBA.com, Teams, <http://www.nba.com> (place cursor on the "Teams" hyperlink at the top of the page for a drop-down menu) (last visited Dec. 17, 2005); NHL.com, Teams, <http://www.nhl.com/teams/index.html> (last visited Dec. 17, 2005). Although presently both leagues consist of fewer Canadian Franchises than previously, the NBA still includes the Toronto Raptors, and the NHL has six Canadian teams. *Migration of Franchises: Teams on the Move*, SPORTS ILLUSTRATED, Dec. 27, 2004, at 110, 110–12. The NBA's only other Canadian team, the Vancouver Grizzlies, moved to Memphis, Tennessee in 2001, after existing just six years in British Columbia. *Id.* at 112. The NHL started with two of its "original six" teams playing home games on Canadian ice (Montreal and Toronto). *Id.* There have been as many as eight Canadian hockey franchises in the NHL at one point, but as of 2005 there were only six (Montreal, Toronto, Ottawa, Edmonton, Calgary, and Vancouver). *Id.* The NFL has never had a Canadian franchise, due partly to the presence of the Canadian Football League. See generally *The Official Site of the Canadian Football League*, <http://www.cfl.ca> (last visited Dec. 17, 2005). Major League Baseball had two Canadian teams (Montreal and Toronto) from 1977 to 2004, but the Montreal Expos moved to America's capital and became the Washington Nationals in 2005. *Migration of Franchises: Teams on the Move*,

recently been in serious danger of losing its prominence among sports fanatics throughout the United States and even in Canada.⁹ With player salaries soaring¹⁰ and big-time television contracts falling,¹¹ the NHL has

supra, at 111. Before relocating the Expos to Washington, D.C., the MLB considered several other more southerly locations, including Monterrey, Mexico. Ed Waldman, *Also-ran Cities Set to Pinch Hit if D.C. Drops Out of Race*, BALT. SUN, Dec. 16, 2004, at 5C. The four major leagues have never actually had a franchise in Mexico. *Id.* For a comprehensive look at the past and future of professional sports franchises in Canada see Heather Manweiller & Bryan Schwartz, *Time Out: Canadian Professional Sports Team Franchise—Is the Game Really Over?*, 1 ASPER REV. INT'L BUS. & TRADE L. 199, 199–210 (2001).

⁹ Americans follow other sports much more intensely than hockey, as shown by the revenue differences in the four largest leagues. Kulfan, *supra* note 8, at 6G. The NHL, for instance, generates gross revenues that are less than half of what the NFL makes. *Id.* According to a December 2004 Gallup poll, over three-fourths of the people surveyed did not consider themselves fans of hockey. Gallup Poll Social Series: Lifestyles (Dec. 5, 2004–Dec. 8, 2004), <http://institution.gallup.com/documents/question.aspx?question=151494&Advanced=0&SearchConType=1&SearchTypeAll=hockey> (last visited Dec. 17, 2005). Less than twenty percent of responders considered themselves fans of hockey. *Id.* Another Gallup poll found that only twenty-three percent of Americans described themselves as hockey fans. *Go Figure*, SPORTS ILLUSTRATED, Dec. 27, 2004, at 36. In that same poll, respondents ranked hockey tenth among the eleven sports listed in the survey, with hockey coming in behind figure skating. *Id.* These numbers demonstrate that a further decline in hockey's popularity among Americans would be no shock; however, hockey is a part of the history and national pride of Canada. Soriano, *Rangers Avoid Arbitration*, ORLANDO SENTINEL (Fla.), Jan. 18, 2005, at C3. Historians believe that the first modern hockey league started in Kingston, Ontario in 1885. NHL.com Hockey History, <http://nhl.com/hockeyu/history/evolution.html> (last visited Dec. 17, 2005). The champion of professional hockey has won the Stanley Cup—one of the most recognizable trophies in the world—since 1893. NHL.com Stanley Cup History, <http://nhl.com/hockeyu/history/cup/cup.html> (last visited Dec. 17, 2005). Over a century ago, Lord Stanley, the late Earl of Preston and Governor General of Canada, purchased the first Cup for the “champion hockey team in the Dominion (of Canada).” *Id.* Canada continues to support a strong Olympic hockey program, with the Canadian team winning the 2002 Olympic Gold Medal. *Stand on Guard for Thee: Canada Captures First Hockey Gold Medal in 50 Years*, CNNSI.COM, Feb. 24, 2002, http://sportsillustrated.cnn.com/olympics/2002/ice_hockey/news/2002/02/24/usa_canada_ap/ (calling hockey Canada's “national sport”). The NHL is to Canada what the NFL is to the United States. Soriano, *Rangers Avoid Arbitration*, *supra*, at C3. During the cancelled season of 2004–05, a bored and disappointed NHL fan from Winnipeg, Manitoba wrote to the Kansas City Star: “Now we just sit around in our basements and drink antifreeze.” *Id.*

¹⁰ Pierre Lebrun, *Blame it On '97–'98*, EDMONTON SUN (Alta., Can.), Sept. 21, 2004, at SP2.

¹¹ See Etan Vlessing, *A Salary Cap: The NHL “Doesn't Have a Choice,”* AMUSEMENT BUS., July 31, 2004, at Up Front.

turned off much of its fan base.¹² The League's operating costs have reached an all-time high,¹³ and fan interest has sunk to an unprecedented low.¹⁴ The business model of the NHL's old collective bargaining agreement led to this financial disarray and the labor lockout of 2004–05.¹⁵ In an effort to ameliorate the League's fiscal crisis and prevent another labor dispute, the League's new CBA includes some necessary changes to its plan of business.¹⁶

Salary arbitration was a key element of the NHL's old collective bargaining agreement with its players, and it remains the cornerstone of the League's settlement of salary disputes under the new CBA. This Note will demonstrate the link between the NHL's use of salary arbitration under the old CBA and the League's recent decline, and will discuss the implications of the League's salary arbitration rules under the new CBA.

This analysis is important, because the NHL's use of salary arbitration has broad implications. First, professional sports in general are big business in North America.¹⁷ Hockey is a particularly important enterprise in

¹² Michael Rosenberg, *Bettman Created this Mess*, THE RECORD (Bergen County, N.J.), Oct. 24, 2004, at S6. As with any spectator sport, the NHL's fan base is integral to its success as a financially viable and socially important entity. NHL CBA, CBA FAQ: NHL Announces Cancellation of 2004–05 Season, <http://www.nhl.com/nhlhq/cba/index.html> (last visited Dec. 17, 2005). When NHL Commissioner Gary Bettman officially cancelled the 2004–05 season, he apologized to the fans, saying he “[was] truly sorry.” *Id.* “Every professional sports league owes its very existence to its fans,” he added. *Id.*

¹³ See Michael Steinberger, *Cap Row May Stop the Puck Here*, FIN. TIMES (London), Sept. 14, 2004, at 18.

¹⁴ Kulfan, *supra* note 8, at 6G; Larry Brooks, *Paying for Lockout Tix off Fans*, N.Y. POST, Oct. 3, 2004, at 60; Doug Robinson, *NHL's on Strike and Nobody Even Noticed*, DESERET MORNING NEWS (Salt Lake City), Nov. 1, 2004.

¹⁵ Helene Elliott, *The NHL Lockout: A “Bleak Day,”* L.A. TIMES, Sept. 16, 2004, at D1.

¹⁶ Elliott, *supra* note 5, at D1. The new CBA imposes a salary cap and floor (\$39 million and \$21.5 million, respectively for the 2005–06 season) on each team. *Id.* Additionally, the new CBA guarantees players will receive between 54% and 57% of League revenues each year, depending on the level of League revenues for those years. *Id.* The new CBA also imposes restrictions on individual salaries. *Id.*

¹⁷ The MLB generates \$4.1 billion in revenues per year, while the NBA makes over \$3 billion and the NFL grosses \$5 billion per year. Kulfan, *supra* note 8, at 6G. In 2004, Forbes Magazine valued the worth of the Washington Redskins (just one franchise in the NFL) at over \$1 billion. Nunyo Demasio, *Poor Record No Reflection on a Rich Bottom Line*, WASH. POST, Dec. 30, 2004, at D2. The NHL and other leagues typically generate sales in League-related merchandise; however, the labor lockout caused an eighty-five percent decrease in NHL holiday merchandise sales from 2003 to 2004, dropping those

Canada.¹⁸ With the four major professional sports leagues grossing over \$14 billion in 2003 alone,¹⁹ changes to the leagues' approaches to labor disputes can have a profound effect on these economic interests.²⁰ Additionally, any effects, whether positive or negative, that arbitration has on one league could potentially manifest themselves in other leagues using the same processes.²¹

Secondly, with the rise of alternative dispute resolution²² and the passage of the Federal Arbitration Act,²³ adverse parties may rely more and more on

sales to \$6.9 million for the 2004 holidays alone. *Go Figure*, SPORTS ILLUSTRATED, Jan. 24, 2005, at 20.

¹⁸ A Canadian governmental study estimated that Canada's gross domestic product (GDP) will decrease \$170 million as a result of the 2004–05 NHL season cancellation. *Go Figure*, SPORTS ILLUSTRATED, Feb. 14, 2005, at 20. That \$170 million breaks down to approximately \$17 million per month (of the lockout) in lost GDP, and the entire Canadian GDP is roughly only \$1.05 trillion. *Soriano, Rangers Avoid Arbitration*, *supra* note 9, at C3. GDP is the "output of goods and services produced by labor and property located in United States." News Release: Gross Domestic Product and Corporate Profits, U.S. Department of Commerce, Bureau of Economic Analysis (Jan. 28, 2005) <http://www.bea.gov/bea/newsrel/gdpnewsrelease.htm>.

¹⁹ Kulfan, *supra* note 8, at 6G.

²⁰ *Id.* Players' salaries eat up a large chunk of all four leagues' revenues. *Id.* In the NHL, for instance, players' salaries take 75% of that League's revenue. *Id.* That number is 64% for the NFL, 63% for the MLB, and 58% for the NBA. *Id.*

²¹ Demonstrating the interlocking nature of professional sports, teams from different leagues often share the same stadium. THE SPORTS STAFF OF USA TODAY, THE COMPLETE FOUR SPORT STADIUM GUIDE: EVERYTHING YOU WANTED TO KNOW ABOUT ALL OF THE MAJOR LEAGUE AND FOOTBALL STADIUMS AND HOCKEY AND BASKETBALL ARENAS (Balliett & Fitzgerald, Inc. ed., Fodor's Travel Publications, Inc., 2d ed. 1996). In Ohio alone, the Cleveland Indians (MLB) played on the same field as the Browns (NFL) and the Cincinnati Reds (MLB) shared a home field with the Bengals (NFL) until those cities built new, separate stadiums for all four teams in the 1990s and the first decade of 2000. *Id.* NBA teams and NHL teams frequently share arenas. *Id.* The arena staff simply changes the floor, depending on whether the upcoming game requires a hardwood court or an ice rink. *Id.* Two teams from the same league have even shared the same stadium. Dave Sheinin, *If Nats Move, Problems Await*, WASH. POST, Dec. 18, 2004, at D1 ("Nats" is the nickname for the Washington Nationals). The Los Angeles Angels and Dodgers played on the same home field in the 1960s, while the New York Mets and Yankees did the same in 1974–75. *Id.* Due to the many ways professional sports interlock, changes in one league affect the others as well.

²² Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1297–1303 (1998). "ADR" has become a mantra of national policy" to the point that "[t]he range of disputes now subject to statutory or court-annexed ADR programs is mind-boggling." *Id.* at 1299–1300.

²³ 9 U.S.C. § 2 (2000). On February 10, 2005, the American Arbitration Association (AAA) commemorated the eightieth anniversary of the Federal Arbitration Act (FAA).

arbitration to resolve their legal disputes.²⁴ Adverse parties contract to resolve their disputes by setting up particular rules of arbitration.²⁵ These rules affect how those disputes are resolved, whether by following through with arbitration, or by settling to avoid arbitration. Additionally, the NHL's use of salary arbitration can provide important lessons for other groups, such as other large businesses and labor unions.²⁶

Finally, in recent years under the old CBA, the NHL lost money rather than generating a profit, and salary arbitration played a surprisingly large role in causing this financial situation.²⁷ Despite the end of the lockout and the League's new rules, the future of the NHL remains cloudy.²⁸ As they did under the old CBA, salary arbitration rules under the new CBA will likely play a key part in the NHL's future success or failure.²⁹

American Arbitration Administration Hosts Lecture to Commemorate the 80th Anniversary of the Federal Arbitration Act, PR NEWSWIRE U.S., Jan. 25, 2005, available at LEXIS News Library PRNewswire File. The FAA has allowed the application of arbitration to a more expanded range of commercial disputes. *Id.*

²⁴ Richard Roth & Jordan Kam, *To Write or Not to Write: The Arbitral Dilemma*, N.Y. L.J., Jan. 26, 2005, at 5 (noting a "tremendous increase in arbitrations over the past few years"). The AAA conducted 230,255 arbitration and mediation cases in 2002 alone. *A Brief Overview of the American Arbitration Association*, <http://www.adr.org/overview> (last visited Dec. 17, 2005).

²⁵ BLACK'S LAW DICTIONARY 41 (2d pocket ed. 2001). This is what the NHL and NHLPA do when they agree to salary arbitration rules in their collective bargaining agreements.

²⁶ Several large businesses with considerable labor unions, such as airlines, rely on arbitration for disputes between management and labor. *See, e.g.,* Dominic Gates, *Alaska Might Outsource 500 Jobs: Baggage Handlers at SeaTac at Risk—Flight Attendants' Portland Base Closes*, SEATTLE TIMES, Jan. 19, 2005, at C1 (noting that Alaska Airlines and its pilots engage in "binding-arbitration talks"). While the business models of professional sports leagues and large non-sports industries differ, the procedural rules of arbitration that the various entities employ to solve labor disputes may produce similar results.

²⁷ NHL.com, 2002–03 League-Wide URO Results, http://www.nhl.com/nhlhq/cba/archive/bythenumbers/uro_results.html (last visited Dec. 17, 2005) [hereinafter 2002–03 URO]. These numbers indicate that the NHL operated at a \$273 million deficit for the 2002–03 season alone. *Id.*

²⁸ *See* NHL Announces Cancellation of 2004–05 Season, *supra* note 12. 2005 is only the second time that the NHL did not crown a champion in the League's lengthy and storied history. Pierre Lebrun, *It's All Over . . . Season Sacked*, BROCKVILLE RECORDER & TIMES (Ont., Can.), Feb. 17, 2005, at B1. In 1919, the Spanish flu prevented the end of the Stanley Cup finals between Montreal and Seattle. *Id.* To resume play, the NHL and NHLPA must eventually agree on a new CBA or else disband and start anew. *Id.*

²⁹ Salary arbitration is one of the major parts of the NHL/NHLPA collective bargaining agreement. NHL CBA, Collective Bargaining Agreement FAQs,

In Section II, this Note discusses the NHL's recent financial decline. Next, Section III gives a brief history of the use of salary arbitration in professional sports and then outlines, in detail, the salary arbitration system in Major League Baseball (MLB) and the NHL—under both the old and new CBA. Section IV analyzes the effects of the NHL's salary arbitration system and the alternatives to those procedures. Finally, Section V draws conclusions about the NHL's methods of arbitration and makes recommendations for the future use of salary arbitration in major professional sports.

II. THE FINANCIAL DECLINE OF THE NATIONAL HOCKEY LEAGUE

The NHL hopes the new CBA will stop the League's serious financial decline that occurred over the life of the last collective bargaining agreement.³⁰ Following the 2002–03 season, nineteen of the NHL's thirty teams reported an operating loss.³¹ Those nineteen teams lost a combined \$342.4 million in that one season alone.³² Four teams lost over \$30 million,

<http://www.nhlcbanews.com/cba/index.html> (last visited Dec. 17, 2005) [hereinafter CBA FAQs].

³⁰ See Tucker, *supra* note 7, at 1E. In 2004, the Former Chairman of the Securities and Exchange Commission (SEC), Arthur Levitt, called professional hockey a “dumb investment” after heading a year-long assessment of the NHL's financial situation. Scott Van Voorhis, *On Thin Ice: Report: Most NHL Teams Lose Millions*, BOSTON HERALD, Feb. 13, 2004, at 39. Levitt's study produced the Unified Report of Operations (URO), which revealed that the NHL lost about \$300 million during the 2002–03 season. *Id.* The study, however, has been a source of continued controversy, as the NHLPA and the NHL quarrel over just how bad is the NHL financial situation. *Id.* (quoting the NHLPA referring to Levitt and his associates as a “team of hired gun accountants,” who the NHL paid “in the \$500,000 range” to produce a “sobering” survey to convince the NHLPA and fans that drastic changes to the League's salary system must follow). The Levitt Report revealed, not surprisingly, that the greatest source of income for the NHL is the money fans pay to see games. *Id.* Gate receipts totaled \$997 million of the League's combined \$1.494 billion revenue in 2002–03. *Id.* Broadcasting-media brought in less than half of the total from gate receipts, or \$449 million. *Id.* The NHLPA continued to challenge the accuracy of these numbers as the labor lockout of 2004–05 continued. Dave Hannigan, *Ice Hockey: Impasse in Labour Dispute Means Big Freeze for Whole NHL Season: Greed Blamed for Shut-down*, THE GUARDIAN (London), Feb. 17, 2005, at 29 (noting that “[a]fter 38 meetings over two years, their [owners' and players'] evaluations of the sport's [NHL's] financial condition still differed too greatly [to reach a labor agreement]”).

³¹ 2002–03 URO, *supra* note 27; see also http://www.nhl.com/nhlhq/cba/archive/bythenumbers/historical_results.html (last visited Dec. 17, 2005).

³² 2002–03 URO, *supra* note 27.

only one team lost less than \$5 million, and the remaining fourteen clubs lost between \$5 million and \$30 million.³³ The average loss of these nineteen franchises was \$18 million.³⁴ In addition, four teams have gone bankrupt.³⁵

The few profitable teams do not sufficiently counter the failing teams: of the eleven teams that reported a net profit for the 2002–03 season, only two clubs produced over \$10 million.³⁶ The average profit of these eleven clubs was a meager \$6.4 million, and their combined profit was just under \$70 million.³⁷ As a result of these figures, the NHL as a whole lost around \$273 million during the 2002–03 season.³⁸ The NHL's dire financial situation has prompted the League's commissioner to admit that "we lose less money by not playing."³⁹

These figures beg the following question: why did the NHL lose so much money? Several factors, including an overall decreasing fan interest⁴⁰ and rapid expansion to relatively uninterested markets, contributed to the problem.⁴¹ In the decisive Game Seven of the Stanley Cup Finals in June

³³ *Id.*

³⁴ *Id.*

³⁵ Chris Snow, *You Say Tomato, I say . . . ; Here are the Key Issues the League and the National Hockey League Players' Association Dispute*, STAR TRIB. (Minneapolis), Sept. 15, 2004, at 3C. The Pittsburgh Penguins filed for bankruptcy in 1974 and 1998, while the Los Angeles Kings went bankrupt in 1995. Kevin Allen, *Senators File for Bankruptcy, but Will Keep Skating*, USA TODAY, Jan. 9, 2003, available at http://www.usatoday.com/sports/hockey/nhl/senators/2003-01-09-bankruptcy_x.htm. The Ottawa Senators filed for bankruptcy in January 2003. *Id.* A week later, the Buffalo Sabres followed suit. *Sports FYI: Solich Names Assistants*, TULSA WORLD (Okla.), Jan. 14, 2003, at B2. These are the only four existing major professional sports franchises to go bankrupt. *Id.*

³⁶ 2002–03 URO, *supra* note 27.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Elliott, *supra* note 15, at D9; *Commish Claims Locked-out Union in Denial*, ESPN.COM, Nov. 2, 2004, <http://sports.espn.go.com/espn/print?id=1914328&type=story>.

⁴⁰ A January 2005 USA Today/Gallup Poll discovered that fifty percent of sports fans would "not be disappointed at all" if the NHL/NHLPA labor disputes cancelled the 2004–05 NHL season. Mike Brehm, *Poll: No NHL Would be No Biggie for Sports Fans*, USA TODAY, Jan. 11, 2005, at 3C. ESPN Analyst and Former NHL Goaltender Darren Pang believed that "even the casual sports fans last year, going into Game 7 of [the] Tampa Bay-Calgary (Stanley Cup Finals), were somewhat excited about our sport." *Id.* However, fan interest has considerably declined, as another recent Gallup Poll conducted in December 2004 found that only 23 percent of Americans considered themselves hockey fans. *Go Figure*, *supra* note 9, at 36.

⁴¹ Rosenberg, *supra* note 12, at S6.

2004,⁴² ABC registered a 5.4 viewer rating, which was 0.4 lower than the previous season's Game Seven rating.⁴³ Earlier games in the 2004 Stanley Cup finals attracted the lowest ratings in twenty years.⁴⁴ The 2004 World Series of Poker attracted higher ratings on ESPN, a national cable network, than the first two games of the Stanley Cup Finals on ABC, a national network with a greater potential audience than ESPN.⁴⁵ Reflecting the reality that hardly anybody watches the NHL on television anymore, NBC paid the NHL *no money* upfront in the League's latest TV deal.⁴⁶ The NHL hopes that

⁴² The Stanley Cup Finals are the championships of the NHL. See NHL.com, Stanley Cup, <http://nhl.com/hockeyu/history/cup/index.html> (last visited Dec. 17, 2005). The Stanley Cup finals are a best-of-seven format, which means that the first team to win four games wins the NHL championship. *Id.* The seventh game of the series, then, is the "decisive" game, since the winner of Game Seven also wins the championship. Therefore, given the relative importance and decisiveness of the final game in the series, Game Seven of the 2004 Stanley Cup Finals should have attracted a large audience.

⁴³ Vlessing, *supra* note 11, at Up Front. A TV rating is "the estimate of the size of a television audience relative to the total universe, expressed as a percentage." Top Ten Primetime Broadcast TV Programs for Week of 2/07/05–2/13/05, Nielsen Media, <http://www.nielsenmedia.com/index.html> (last visited Sept. 19, 2005). "As of September 20, 2004, there [were] an estimated 109.6 million television households in the U.S. A single national household ratings point represents 1%, or 1,096,000 households." *Id.* Therefore, the 5.4 rating from the final game of the 2004 Stanley Cup Playoffs translated to about 5,918,400 viewers. Comparatively, on February 6, 2005, Super Bowl XXXIX—the NFL's championship equivalent of Game Seven of the Stanley Cup Playoffs—attracted a 41.1 rating, or about 45,045,600 viewers. David Barron, *Hamilton Eagerly Eyes His Milestone Season*, HOUSTON CHRON., Feb. 11, 2005, Sports, at 2.

⁴⁴ Vlessing, *supra* note 11, at Up Front.

⁴⁵ Rick Riley, *TV Poker's a Joker*, SPORTS ILLUSTRATED, Oct. 25, 2004, at 156; see generally Larry Brooks, *Eve of Destruction; Owners Are Out to Ruin NHL*, N.Y. POST, Sept. 12, 2004, at 62. ABC is a basic channel that has a potential of reaching 109.6 million television households in the United States alone. Top Ten Primetime Broadcast TV Programs for Week of 2/21/05–2/27/05, Nielsen Media Research, available at <http://www.nielsenmedia.com/index.html> (last visited Sept. 20, 2005). Fewer television households subscribe to a cable service, so cable networks, like ESPN, have fewer potential viewers. *Id.*

⁴⁶ Vlessing, *supra* note 11, at Up Front. Before 2005, the NHL had a five year, \$600 million contract with ABC and ESPN. Joe LaPointe, *ABC and ESPN Script Grabs More Eyeballs*, N.Y. TIMES, June 6, 2003, at D5. The NHL has traditionally had smaller television contracts than the NBA, NFL, and MLB. *Id.* Other professional sports leagues consistently sign television contracts that dwarf the NHL's largest TV deal ever: five-years, \$600 million (from 1999–2004). Todd Jones, *NHL Reached for the Sky, But It Really Needed Firm Foundation*, COLUMBUS DISPATCH, Feb. 18, 2005, at B3. The 2005 network television deals of other pro sports leagues included \$17.6 billion for the NFL, \$4.7 billion for the NBA, and \$3.35 billion for the MLB. *Id.* Even professional racecar

the newly unveiled rules of play for the 2005–06 season will help spark fan interest and reverse these recent trends.⁴⁷

Between 1991 and 2001, the NHL added nine new franchises.⁴⁸ In addition, the League placed some of these teams in warm places where one would not expect to see ice hockey.⁴⁹ At the same time, traditional hockey towns like Winnipeg and Quebec, Canada lost their teams to less-interested American markets.⁵⁰ This expansion to weak markets, coupled with a decreasing fan base, helped to create the NHL's financial difficulties.

While the NHL's poor business decisions helped run the League into the ground, out-of-control player salaries have played the largest part in creating the NHL's money problems.⁵¹ The NHL's 2002–03 audit revealed that the League spent only thirty-nine percent, or roughly \$775 million, of its total operating costs on expenses other than players' salaries.⁵² The NHL spent about *seventy-five percent*, or roughly \$1.5 billion, of its revenues on players' salaries in that same season.⁵³ By comparison, players' costs accounted for only about fifty-seven percent of the NHL's revenues in 1994.⁵⁴

driving demanded a larger TV deal than professional hockey, with NASCAR holding on to a \$2.8 billion deal from network TV during 2005. *Id.*

⁴⁷ Elliott, *supra* note 5, at D1. Speaking on the need for these rule changes, Commissioner Gary Bettman emphasized the need to “drop the puck on a fresh start for the NHL.” *Id.* The NHL unveiled its new rules in an effort to divorce fans' feelings about “the long, dark days of the lockout” and cancelled season of 2004–05 with the NHL and professional hockey in general. *Id.*

⁴⁸ *Migration of Franchises*, *supra* note 8, at 112. Those nine expansion teams and the years the NHL introduced them are: San Jose Sharks (1991), Ottawa Senators (1992), Tampa Bay Lightning (1992), Florida Panthers (1993), Anaheim Mighty Ducks (1993), Nashville Predators (1998), Atlanta Thrashers (1999), Columbus Blue Jackets (2000), and Minnesota Wild (2000). *Id.*

⁴⁹ Elliott, *supra* note 15, at D1. Examples of recently created or relocated southerly NHL franchises include the Phoenix Coyotes (formerly the Winnipeg Jets until 1996), Nashville Predators (expansion team of 1998), and Carolina Hurricanes (formerly the Hartford Whalers until 1997, when they relocated to Raleigh, North Carolina). *Migration of Franchises*, *supra* note 8, at 112.

⁵⁰ See Chris Snow, *The Lost Season?: Lockout Begins Tonight; The Puck Stops Here; NHL, Players Remain Miles Apart as Lockout Appears Certain*, STAR TRIB. (Minneapolis), Sept. 15, 2004, at 1C.

⁵¹ In 2004, players' salaries ate up seventy-five percent of the NHL's revenues. Dave Joseph, *NHL Season Put on Ice: Life Goes On*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Feb. 17, 2005, at 1A.

⁵² 2002–03 URO, *supra* note 27.

⁵³ *Id.*

⁵⁴ Mike Loftus, *NHL Update; Little Movement in Negotiations; Owners, Players Still Heading Toward Lockout*, THE PATRIOT LEDGER (Quincy, Mass.), Sept. 4, 2004, at 47. The NHL's losses continued to mount, as the 2004–05 non-season prevented even the

The NHL has spent, proportionally, much more on paying its players than the other three major professional leagues.⁵⁵ To amplify this financial strain, the NHL is consistently fourth in total annual revenue as well, earning about \$1.1 billion less than its next closest counterpart, the National Basketball Association (NBA).⁵⁶ The NHL has the dubious distinction of being the only league to have any of its franchises file for bankruptcy.⁵⁷

While the NHL's popularity has been in steady decline, players' salaries have increased at a staggering rate. In 1994, the average NHL salary was \$560,000.⁵⁸ In 2004, the average salary was about \$1.8 million, well over three times the average salary just ten years before.⁵⁹ The Leagues' highest-paid players, Peter Forsberg and Jaromir Jagr, earned \$11 million in 2004.⁶⁰ As recently as 1996, the NHL's highest-paid player earned half that—\$5.5 million.⁶¹ These statistics readily show that, over the life of the latest collective bargaining agreement, players' salaries have exploded and destroyed the viability of the NHL.

possibility that the NHL could generate a profit. J.P. Giglio, *RBC, Canes Made Provisions*, THE NEWS & OBSERVER (Raleigh, N.C.), Feb. 19, 2005, at C3. While the owners amassed a \$300 million reserve fund to survive the cancelled season, the teams cannot produce revenues without conducting any games. *Id.*

⁵⁵ Kulfan, *supra* note 8, at 6G. Major League Baseball (MLB) dedicates 63% of its revenue to players' salaries, while the NBA and the NFL spend 58% and 64%, respectively, of their revenues on their players. *Id.*

⁵⁶ *Id.* The MLB earns about \$4.1 billion per year, while the most successful league, the NFL, grosses about \$5 billion. *Id.*

⁵⁷ The first franchise to file for bankruptcy was the Pittsburgh Penguins. Jenny Wiggins, *US Sports Tackle TV Cash Issue: Credit Analysts are Watching for Moves off the Screen*, FINANCIAL TIMES (London), Nov. 14, 2003, at 45. Three other teams—Los Angeles, Ottawa, and Buffalo—have since done the same. See Allen, *supra* note 35; *Sports FYI: Solich Names Assistants*, *supra* note 35, at B2.

⁵⁸ Loftus, *supra* note 54, at 47.

⁵⁹ *Id.*

⁶⁰ Kulfan, *supra* note 8, at 6G.

⁶¹ See Tim Sassone, *Looks Like a Lockout as Deadline Looms: All Signs Pointing to Long Labor Dispute for NHL*, CHI. DAILY HERALD, Sept. 14, 2004, at Sports 1.

III. PROFESSIONAL SPORTS AND SALARY ARBITRATION

A. *The Business Model of the NHL and Arbitration in General*⁶²

Disputes over labor are common, and there is no indication that this prevalence will decrease.⁶³ There will always be disagreements in labor regarding compensation, because management and labor of any given company will disagree over how to distribute that company's profits.⁶⁴ Professional hockey is no exception to this phenomenon,⁶⁵ and indeed, as long as there is big money at stake and there are even larger egos involved, professional hockey's salary disputes will represent some of the most heated disputes in the entire field of labor.⁶⁶

⁶² This subsection gives the reader a basic understanding of the general business structure of the NHL and of the traditional procedural elements of arbitration as one of the basic forms of alternative dispute resolution. For a more detailed look at the franchise system of professional sports see KENNETH L. SHROPSHIRE, *THE SPORTS FRANCHISE GAME* (1995).

⁶³ The American Arbitration Association (AAA), the largest alternative dispute resolution institution in the world, has handled over two million cases, with many in the field of labor. See American Arbitration Association Dispute Resolution Services Worldwide, Fast Facts, <http://www.adr.org/FastFacts> (last visited Dec. 17, 2005). In 2002 when commercial disputes declined, the AAA handled an increased number of labor cases. AMERICAN ARBITRATION ASSOCIATION DISPUTE RESOLUTION SERVICES WORLDWIDE, 2003 PRESIDENT'S LETTER AND FINANCIAL STATEMENTS 4, available at <http://www.adr.org/si.asp?id=1543>, at 4 (last visited Dec. 17, 2005).

⁶⁴ See Michael Arace, *NHL's Lost Season: Nuclear Winter*, COLUMBUS DISPATCH, Feb. 17, 2005, at E1. "The reason" for the 2004–05 NHL lockout and eventual season cancellation was that "the NHL and its players' association couldn't resolve how to split revenues from the \$2.1 billion industry." *Id.*

⁶⁵ Thirty-four players resorted to salary arbitration in the 2003 off-season alone. SI.com, 2003 NHL Salary Arbitration List, http://sportsillustrated.cnn.com/hockey/news/2003/07/16/arbitration_list/ (last visited Dec. 17, 2005).

⁶⁶ During the labor lockout of 2004–05, the NHL and the NHLPA hurled insults at one another, while fans from across North America grew impatient with the lack of a hockey season. See Andrew Gross, *The Puck Stops Here*, J. NEWS (N.Y.), Feb. 17, 2005, at 1C. At the news conference during which Commissioner Bettman cancelled the 2004–05 season, Bettman jabbed at NHLPA Executive Director Bob Goodenow for not being an honest negotiating partner during the lockout. *Id.* Goodenow responded by placing the blame for the cancelled season on the shoulders of the owners. *Id.* This war of words continued throughout the entirety of the lockout. Tom Jones, *Agreement, Optimism Far Away*, ST. PETERSBURG TIMES (Fla.), Sept. 5, 2004, at 1C (noting that both the NHL and NHLPA appeared "more concerned with lobbing insults and questioning whether the other side is even interested in a settlement" than with coming to an agreement).

The National Hockey League operates like a large company with local franchises.⁶⁷ The NHL is essentially a large multi-national company consisting of many subparts.⁶⁸ Each of the thirty teams within the NHL operates as a franchise, which means that the overall system of labor is the same throughout the League, even though different entities own each team.⁶⁹ The thirty team owners collectively act as the NHL,⁷⁰ agreeing to all sorts of collective business decisions.⁷¹ As franchise owners, however, the owners make team decisions for their individual franchises like local franchise owners of McDonald's restaurants do.⁷² Owners decide, within the general rules of the NHL, what players to sign, how much to pay them, who coaches and manages their teams, and other important business decisions.⁷³ This is the ownership side of the NHL's labor system.

The players' side of the NHL is slightly less complicated. Players negotiate and sign contracts with the teams for whom they want to play.⁷⁴ Collectively, however, the players of the NHL act as the National Hockey League Players' Association (NHLPA).⁷⁵ The NHLPA is the players'

⁶⁷ Compare NHL CBA Preamble, <http://web.archive.org/web/20040428065307/http://www.nhlcbanews.com/cba/preamble.html> (last visited Dec. 17, 2005), with McDonald's Corporation, Franchising Home, <http://www.mcdonalds.com/content/corp/franchise/franchisinghome.html> (last visited Dec. 17, 2005) (noting that McDonald's has "always been a franchising company").

⁶⁸ NHL Rulebook, <http://nhl.com/rules/index.html> (last visited Dec. 17, 2005).

⁶⁹ *Id.*

⁷⁰ NHL CBA Preamble, *supra* note 67.

⁷¹ See, e.g., NHL Collective Bargaining Agreement expired on September 15, 2004, <http://www.nhl.com/nhlhq/cba/archive/cba/index.html> (last visited Dec. 17, 2005) [old CBA]. The CBA is the most visible example of any NHL/NHLPA agreement.

⁷² See McDonald's Franchising, *supra* note 67.

⁷³ National Hockey League, National Hockey League Players' Association Collective Bargaining Agreement, (July 22, 2005), art. 5, <http://web.archive.org/web/20041012101809/www.nhlcbanews.com/cba/index.html> (last visited Dec. 17, 2005) [hereinafter NHL CBA] (noting that "[e]ach club . . . shall . . . have the right at any time and from time to time to determine when, where, how and under what circumstances it wishes to operate, suspend, discontinue, sell or move and to determine the manner and the rules by which its team shall play hockey").

⁷⁴ NHL CBA, *supra* note 73, at art. 6, § 2. Under the rules of the old CBA, players relied on the Union's representation, or operated on their own. *Id.* "No Club shall enter into a Player Contract with any player and the NHL shall not register or approve any Player Contract unless such player: (i) was represented in the negotiations by a Certified Agent as designated by the NHLPA under [CBA] Section 6.1; or (ii) if Player has no Certified Agent, acts on his own behalf in negotiating such Player Contract." *Id.*

⁷⁵ *Id.*

union.⁷⁶ As the NHLPA, the players negotiate with the League and agree upon⁷⁷ a method to govern the general labor system of professional hockey. The result of these negotiations is the collective bargaining agreement (CBA), which covers details from player eligibility to baseline compensation to training camps to salary arbitration and free agency.⁷⁸ As with agreements between large companies and their labor unions, the NHL CBA periodically runs out and must be renewed by both sides for the League to continue operating.⁷⁹

In the NHL, players occasionally become free agents—that is, their contracts either expire or contain provisions allowing the players to renegotiate their contracts or to offer their talents to other teams.⁸⁰ Additionally, the CBA provides for salary arbitration, which gives players who meet certain criteria the opportunity to settle salary disagreements with their teams by submitting their cases to third-party arbitrators.⁸¹

Arbitration is traditionally defined as “a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.”⁸² The NHL has utilized its own version of arbitration, defining those procedures in Article 12 of the old CBA.⁸³ One of the main differences between traditionally defined arbitration

⁷⁶ *Id.*

⁷⁷ Ideally the players’ union and owners agree on a collective bargaining agreement. The events of 2004–05, however, demonstrated that such cooperation cannot be taken for granted. See Wes Goldstein, *Players Lose It All After Union Chief Hedges Bet*, CBS SPORTSLINE.COM, Feb. 16, 2005, <http://www.sportslines.com/nhl/story/8201334>.

⁷⁸ NHL CBA, *supra* note 73, <http://www.nhl.com/nhlhq/cba/index.html>

⁷⁹ NHL CBA, *supra* note 73, at art. 3, § 1(a). The last CBA lasted from September 16, 1993 to September 15, 2004. *Id.* The new CBA is six years in duration (through the 2010–11 season) with the NHLPA having the option to re-open the agreement after the fourth year (the 2008–09 season). See also CBA FAQs, *supra* note 29. The NHLPA also has the option of extending the CBA for an additional year at the end of the 2010–11 season. *Id.*

⁸⁰ Players exercise these options in an attempt to increase their salaries. NHL CBA, *supra* note 73, at art. 10.

⁸¹ NHL CBA, *supra* note 73, at art. 12.

⁸² BLACK’S LAW DICTIONARY 41 (2d pocket ed. 2001). Typically, an arbitrator’s decision is binding. *Id.*

⁸³ NHL CBA, *supra* note 73, at art. 12. Article 12 of the old CBA did not have an explicit definition for “salary arbitration.” *Id.* Instead, the entire article defined how the NHL uses arbitration by outlining the specific guidelines for League’s use of the procedure. *Id.* Mediation, another form of alternative dispute resolution, is less formal than arbitration. BLACK’S LAW DICTIONARY 444 (2d pocket ed. 2001). In addition, parties typically resolve their own disputes in mediation, while arbitrators, as agreed-upon third

and the old CBA's version is the unique and limited "walk-away" provision, wherein one party can refuse to bind itself to the arbitrator's decision.⁸⁴

B. *The Emergence of Salary Arbitration in Professional Sports*

In the competitive and highly-charged world of professional sports, disputes abound, especially in the past ten years.⁸⁵ Players, sponsors, team owners, and agents have millions of dollars at stake in sports-related contracts.⁸⁶ Due to the emotions, inherent complexities, and power struggles that exist in professional sports, there will always be severe disputes in sports which will inevitably end up in the courts.⁸⁷

While some disagreements *do* end up in the courts,⁸⁸ professional sports leagues have relied on alternative dispute resolution (ADR) techniques to settle some of these problems for decades.⁸⁹ One of the main aspects of professional sports that inevitably creates discord is the process of determining players' contracts—the age-old disagreement of the player wanting more and the team's ownership offering less. To minimize excessive delays, high costs, procedural rigidity, and unsatisfactory results,

parties, decide cases in arbitration. *Id.* Moreover, mediation may produce a settlement agreement, whereas a settlement agreement may avoid the need for arbitration. *Id.*

⁸⁴ NHL CBA, *supra* note 73, at art. 12, § 6. Thus, with a walk-away right, the arbitrator's decision may not have been binding after all. This limited right, which was retained by only the clubs and not the players, is explored in detail, *infra* Part III(D)(2).

⁸⁵ See SPORTS LAW: A PRACTICAL GUIDE 230 (Mark Fewell ed., 1995).

⁸⁶ *Id.* The NFL, for instance, has a six-year, \$8 billion television contract with CBS and Fox. Stephen A. Smith, *As Other Sports Falter, NFL Continues Its Rise*, PHILA. INQUIRER, Feb. 5, 2005. In addition, that league has a five-year, \$3.5 billion contract with DirectTV. *Id.* The staggering numbers in professional sports include the costs of the stadiums in which the leagues' franchises play. See David Nakamura, *D.C. Seeks "Signature" Ballpark*, WASH. POST, Feb. 6, 2005, at C1. The recently relocated Montreal Expos baseball team, now known as the Washington Nationals, has a \$279 million budget with which to build a new baseball stadium. *Id.*

⁸⁷ SPORTS LAW: A PRACTICAL GUIDE, *supra* note 85, at 230.

⁸⁸ Numerous sports controversies end up in court, and many have very colorful facts and outcomes. See, e.g., *Pace v. Cleveland Browns Football Club*, No. 95-L-195, 1996 WL766165, at *1 (Ohio Ct. App., Dec. 20, 1996). With four home games remaining in the 1996 season, Cleveland Browns owner Art Modell announced that, at the end of the season, he would be moving the team to Baltimore, Maryland. *Id.* Plaintiff Pace, a Browns season ticket holder, sued the team for the value of the tickets for the remaining games. *Id.* The trial court found in favor of the plaintiff, but the court of appeals reversed. *Id.*

⁸⁹ SPORTS LAW: A PRACTICAL GUIDE, *supra* note 85, at 241–42. For example, the NHL and MLB have had salary arbitration since the 1970s. *Id.*

professional sports leagues have employed ADR techniques, particularly arbitration, to settle salary disputes.⁹⁰

Salary arbitration's roots in professional sports traces back to 1970, when the NHL first used the process to settle compensation disputes between players and teams.⁹¹ Not long after, the MLB followed the NHL's lead by including an arbitration procedure in its 1973 CBA.⁹² Both leagues continue to employ salary arbitration in their respective collective bargaining agreements⁹³ and remain the only two (of the four major professional sports) leagues to use salary arbitration.⁹⁴

C. Major League Baseball's "Final-Offer" Salary Arbitration System

Major League Baseball's salary arbitration system is known as "final-offer" arbitration.⁹⁵ When an MLB arbitration case proceeds, the player and the team's ownership each propose a salary figure.⁹⁶ Within one day of the arbitration hearing, a panel of three baseball "arbitrators must select *either* the player's demand *or* the club's offer."⁹⁷ There can be no compromise, no explanation, and no delay."⁹⁸ Furthermore, neither the players nor the team may appeal the arbitrators' decisions, and players may not hold out for better

⁹⁰ *Id.*

⁹¹ ROGER I. ABRAMS, *THE MONEY PITCH: BASEBALL FREE AGENCY AND SALARY ARBITRATION* 146 (2000). In 1969, a group called the Task Force on Sports in Canada produced a report that criticized the NHL's owner-friendly labor structure. See ROBERT C. BERRY ET AL., *LABOR RELATIONS IN PROFESSIONAL SPORTS* 209 (1986). Using this report as leverage, the NHLPA convinced the owners to consent to salary arbitration for the 1970 season. *Id.* At that time, however, the NHL still used the "reserve clause" in the standard player contract, meaning that free agency did not exist in professional hockey. *Id.* at 211. The owners agreed to salary arbitration while keeping the reserve system in tact. *Id.* Much like the emergence of free agency in the MLB, the NHL did not allow free agency until 1972. *Id.*

⁹² PAUL D. STAUDOHAR, *THE SPORTS INDUSTRY AND COLLECTIVE BARGAINING* 41-42 (2d ed. 1989). Following the NHL's lead, the MLB finally succumbed to a free agency system in December of 1975. *Id.* at 34.

⁹³ *Id.* at 41, 150. The NHL's new CBA also includes provisions for salary arbitration. CBA FAQs, *supra* note 29.

⁹⁴ Kulfan, *supra* note 8, at 6G. The NHL and the MLB have salary arbitration, while the NFL and NBA do not. *Id.*

⁹⁵ See ABRAMS, *supra* note 91, at 146-47. BERRY ET AL., *supra* note 91, at 58.

⁹⁶ See ANDREW ZIMBALIST, *BASEBALL AND BILLIONS: A PROBING LOOK INSIDE THE BIG BUSINESS OF OUR NATIONAL PASTIME* 82 (1992).

⁹⁷ ABRAMS, *supra* note 91, at 146-47.

⁹⁸ *Id.*

deals.⁹⁹ The final-offer system is simple enough: for example, if the ballplayer asks for \$750,000 and the owner offers \$500,000, the arbitrator must choose either \$750,000 or \$500,000, one or the other.

The final-offer feature is designed to stimulate negotiations and to discourage arbitration.¹⁰⁰ The final-offer system “encourages each side to put forward more realistic figures.”¹⁰¹ The higher chance that the arbitrator will choose the opposing side’s offer leads to this anticipated effect. In other words, if the arbitrator must choose either the player’s high demand or the club’s low offer, the parties will compromise between the two extremes rather than risk having the arbitrator rule in favor of one or the other party.¹⁰² “If either side gets too far out of line, the other’s position will be adopted by the arbitrator.”¹⁰³ The desire to win the arbitration equals an incentive to be as realistic as possible, and the less extreme demand or offer typically becomes the winning position.

1. *The Advantages of MLB’s Final-Offer Arbitration*

There are several advantages to the MLB’s final-offer system. The final-offer approach facilitates negotiation.¹⁰⁴ While the main advantage of settling before going to final-offer arbitration is obtaining a more favorable outcome, there are other benefits to settling salary disputes rather than going to trial or arbitration. First, arbitration hearings, like court proceedings, are adversarial and can strain the relationship between players and management.¹⁰⁵ Second, the parties must finance their arbitrations,¹⁰⁶ including paying the panel of arbitrators and funding their sides’ costs of discovery, which yields the evidence that they submit at the hearings.¹⁰⁷ Some elements of discovery,

⁹⁹ *Id.* at 147.

¹⁰⁰ See STAUDOHAR, *supra* note 92, at 43.

¹⁰¹ ZIMBALIST, *supra* note 96, at 82.

¹⁰² See STAUDOHAR, *supra* note 92, at 44.

¹⁰³ *Id.*

¹⁰⁴ Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AM. REV. INT’L ARB. 383, 384–85 (1999).

¹⁰⁵ ABRAMS, *supra* note 91, at 149; *NHL: Kiprusoff Arbitration Gets Nasty*, EDMONTON SUN (Alta. Can.), Aug. 22, 2004, at SP14; Chris Snow, *Wild Wraps Up Two More; Brunette, Mitchell Deals will Avoid Arbitration*, STAR TRIB. (Minneapolis), Aug. 13, 2004, at 2C (noting that the salary arbitration process can be “degrading” and “potentially risky”).

¹⁰⁶ ABRAMS, *supra* note 91, at 149.

¹⁰⁷ 2003–2006 Basic Agreement between the MLB and MLBPA, art. VI(F)(11), http://us.il.yimg.com/us.yimg.com/i/spo/mlbpa/mlbpa_cba.pdf (last visited Dec. 17, 2005). “The Player and Club shall divide equally the costs of the hearing, and each shall

especially depositions, can be incredibly expensive.¹⁰⁸ Third, when parties settle, they can devise creative multi-year deals or compensation packages that involve bonuses or no-trade clauses,¹⁰⁹ whereas baseball's system allows arbitrators to award only single-year contracts for specified salaries.¹¹⁰ Finally, settlement creates an atmosphere of cooperation, rather than of contention.¹¹¹ Settlement can "build the parties' relationship rather than rupture it"¹¹² by allowing the players and owners to reach a mutually acceptable common ground. On the other hand, the arbitrators' decision in an MLB salary dispute is exactly what one of the parties wanted and exactly what the other party did *not* want. In other words, "there is always one winner and one loser."¹¹³ Settlement, therefore, can be superior to arbitration in many ways.

If the purpose of baseball's final-offer arbitration system is to encourage the clubs and players to resolve their disputes without resorting to arbitration, then the MLB's salary arbitration system operates properly when parties settle. Evidence shows that in the area of public employment labor disputes, the final-offer element encourages negotiations and settlement.¹¹⁴ In the Major Leagues, however, players continually resort to salary arbitration rather than settle their disputes with management, leading to speculation regarding the cause of this phenomenon.¹¹⁵ Disputes end up in arbitration for any of the following reasons: (1) players have "distinctly mixed profiles," (2) one party "fails to correctly gauge the market value of a player's services," (3) a club may not have "the financial resources to pay" what the player

be responsible for his own expenses and those of his counsel or other representatives." *Id.* at 17.

¹⁰⁸ See STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 419 (6th ed. 2004). "In a full-blown deposition both sides have their lawyers there; if the witness is not one of the parties he or she may also be represented by a lawyer. In addition, the deposing party must arrange for some form of recording or transcription of the deposition. . . . [E]ach hour of deposition time may amount to thousands of dollars in legal fees and costs." *Id.*

¹⁰⁹ See ABRAMS, *supra* note 91, at 149. Settling allowed Johan Santana and the Minnesota Twins to sign a four-year, \$40 million contract in 2005. *Twins Agree to Four-Year, \$40M Deal with Santana*, CBS SPORTSLINE.COM, Feb. 14, 2005, <http://www.sportslines.com/mlb/story/819457>. If the two sides would have relied on arbitration, the arbitrator could have picked a one-year deal worth either \$5 million (the club's expected offer) or \$6.8 million (Santana's expected salary demand). *Id.*

¹¹⁰ See ABRAMS, *supra* note 91, at 149.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See DALE YODER & PAUL D. STAUDOHAR, *PERSONNEL MANAGEMENT AND INDUSTRIAL RELATIONS* 488-89 (7th ed. 1982).

¹¹⁵ See ABRAMS, *supra* note 91, at 150-51.

demands, (4) the club may want to avoid the spiraling effects that increased compensation has on other players' salaries, and (5) the "personalities and egos of the participants" may preclude settlement.¹¹⁶

When baseball players *have* resorted to arbitration, the owners have been more successful, at least in the relative number of times that arbitrators have picked owners' offers.¹¹⁷ From 1974 to 1999, arbitrators determined a total of 417 salary disputes.¹¹⁸ The owners "won" 236 arbitrations to the players' 181.¹¹⁹ In only six of those years have the players been more successful than the owners in overall arbitration wins.¹²⁰ While owners have won most arbitrations, the players have benefited from the MLB's arbitration system.

2. MLB's Salary Arbitration System's Effect on Players' Salaries

The salary arbitration system has led to sky-rocketing salaries in Major League Baseball.¹²¹ Even when players lose their arbitrations, their salaries tend to rise nonetheless.¹²² Increasing salaries result from arbitration because a player *always* wins his arbitration hearing, even if the arbitrators pick the owner's offer.¹²³ There are three ways players win salary arbitrations. First, players win arbitration by filing for arbitration in the first place.¹²⁴ Simply by filing for arbitration, players consistently double their salaries.¹²⁵ "Even if they never have to go through an arbitration hearing, players receive higher salaries than they otherwise would have received if they were not eligible for arbitration."¹²⁶ The reasons for this phenomenon are elusive. At least in

¹¹⁶ *Id.*

¹¹⁷ See ABRAMS, *supra* note 91, at 151.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* Those years were 1979, 1980, 1981, 1989, 1990, and 1996. *Id.* at 151–52.

¹²¹ Some followers of baseball refer to the time of the year for MLB arbitrations as baseball's "get-rich season." *Who's Hot, Who's Not*, SPORTS ILLUSTRATED, Feb. 21, 2005, at 31. The first MLB arbitration of 2005 yielded a classic example of the arbitration system's effect on salaries. Kyle Lohse, a right-handed pitcher for the Minnesota Twins who went 9–13 and had a 5.34 ERA (earned run average) in 2004, won that arbitration hearing with a \$2.4 million award. *Id.* In 2004, he grossed \$395,000, but he will earn over six times that in 2005, thanks to this favorable arbitration. *Id.*

¹²² ZIMBALIST, *supra* note 96, at 83.

¹²³ See James B. Dworkin, *Final Offer Salary Arbitration (FOSA)—a.k.a Franchise Owners' Self Annihilation*, in STEE-RIKE FOUR!: WHAT'S WRONG WITH THE BUSINESS OF BASEBALL? 73, 79 (Daniel R. Marburger ed., 1997).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

theory, the threat of going to arbitration “tends to move both parties to negotiate in good faith.”¹²⁷ Since the final-offer system encourages players and owners to settle before arbitration, perhaps the system itself, without actually using arbitration, leads to increased salaries. Additionally, owners know that arbitrators will compare their players to high-priced talent from other teams, and rather than risk losing the arbitration, owners tend to settle for a premium.¹²⁸ Whatever the case, simply filing for arbitration tends to handsomely increase players’ salaries.

Second, players win arbitration by going through arbitration and losing their case.¹²⁹ Like those who file and then settle before arbitration, players who lose their cases still have the market potential that comes with being a player who is eligible for salary arbitration. A player wins by losing his arbitration case, because his club must offer a reasonable market value in arbitration, and this number is always higher than what the player had previously earned.¹³⁰ If this were not the case, the player would not have filed for arbitration in the first place. For example, a player who earns \$500,000 the previous season demands \$1.5 million dollars for next season from his team. The club offers \$1 million dollars instead. If the case proceeds to arbitration, the arbitrator will award the player either \$1.5 or \$1 million. Either way, the player will make at least twice as much as he did the previous year.¹³¹ Studies have shown that players who “lose” their arbitrations still make an average of 150 percent their previous season’s salary.¹³²

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* Dworkin, *supra* note 123, at 79.

¹³⁰ A few factors lead to this phenomenon: First, only players can file for arbitration. *Id.* As a result, owners cannot utilize arbitration on a player who had a bad season. Therefore, owners cannot reverse the upward trend of players’ salaries that the system tends to create. Players will not file for arbitration if they are coming off of bad seasons. *Id.* Arbitration, then, is a strategic means for players to jockey for more money after a good year. Second, the interlocking nature of free agency and arbitration, combined with arbitration’s reliance on comparative players’ statistics and salaries, causes an increase in players’ salaries each year across the board. The arbitrators rely on these figures when deciding between the players’ demands and the owners’ offers. *Id.* Finally, natural market forces, such as inflation, cause salaries to rise. The American inflation rate in 2004 was 3.3%, which represents \$33,000 on a \$1 million salary. Jonathan Riskind, *Bush’s 2006 Budget Full of Cuts*, COLUMBUS DISPATCH, Feb. 8, 2005, at A1. The first factor—the players’ strategic edge—likely explains the increasing arbitration figures the most.

¹³¹ To use a real-life example, Johan Santana of the Minnesota Twins earned \$335,000 in 2003. Dennis Brackin, *Signing of the Times*, STAR TRIB. (Minneapolis), January 9, 2005, at 1C. He filed for arbitration and asked for \$2.45 million, while the Twins offered \$1.6 million. *Id.* Since the arbitrators found for the team, technically Santana lost his arbitration. Even so, in 2004 he still made over four times more than he

Third and finally, players win arbitrations by getting arbitrators to decide in their favor.¹³³ In the previous hypothetical, if the player wins his arbitration, he earns three times what he earned during the previous season. This is a likely phenomenon, because players' salaries have increased at an alarming rate since the MLB started using salary arbitration.¹³⁴ In 1990, Jose Canseco became baseball's highest-paid player, earning about \$4.7 million per year.¹³⁵ Ten years later, Alex Rodriguez held that enviable position by signing a contract worth \$25.2 million per year.¹³⁶ Baseball's average salary has paralleled the rise of the top contracts.¹³⁷ In 1994, the average salary for a Major League Baseball player was \$1.54 million.¹³⁸ In 2004, that number was \$2.49 million.¹³⁹

did the previous season. KFFL.com, Free Agents 2004: 2004 MLB Arbitration Results, <http://kffl.com/article.php/4234/227> (last visited Dec. 17, 2005). Santana was arbitration-eligible in 2005 as well, and the system, once again, helped to increase his salary handsomely. *Twins Agree to Four-Year, \$40M Deal with Santana*, *supra* note 109. Santana and the Twins were scheduled for arbitration on February 15, but the two sides settled the day before. *Id.* Even though "[b]oth sides were more than happy to avoid arbitration," the team will be paying Santana a vastly increased salary for the next four years. *Id.* Santana made \$1.6 million in 2004, and his new salary—the product of arbitration-avoidance settlement—will average out to \$10 million *per year* for the next four years. *Id.* Santana intended to ask for \$6.8 million in arbitration, as opposed to the \$5 million the Twins expected to offer him. *Id.* However, the Twins agreed to double their offer in exchange for a longer term commitment from the pitcher. *Id.* Since salary arbitration produces a one-year compromised deal, avoiding arbitration allowed the Twins to lock Santana in for four years. *Id.* Assuming no settlement, Santana would have made more than three times his previous year's salary had the two sides proceeded to arbitration and had Santana "lost" that arbitration. He would have had a one-year, \$5 million contract. *Id.* Instead, he will be making approximately \$10 million in 2005. *Id.* His 2005 salary—\$10 million—is thirty times his salary from 2003—\$335,000. *Compare* Free Agents 2004: 2004 MLB Arbitration Results, *supra*, with *Twins Agree to Four-Year, \$40M Deal with Santana*, *supra* note 109.

¹³² James B. Dworkin, *Collective Bargaining in Baseball: Key Current-Issues*, LABOR L.J. 480, 480–86 (1988).

¹³³ Dworkin, *supra* note 123, at 80.

¹³⁴ Rich Fletcher, *Show Everybody the Money*, PLAIN DEALER (Cleveland, Ohio), Nov. 14, 2004, at C15.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ John Lindsay, *Baseball Money Explosion Charted*, SCRIPPS HOWARD NEWS SERVICE, Feb. 11, 2004, at SPORTS, available at LEXIS, News Library, SCHWRD File.

¹³⁸ *Id.*

¹³⁹ *Giving Lunch Breaks New Meaning*, DALLAS MORNING NEWS, May 26, 2004, at 16.

While salary arbitration pushes baseball players' salaries up and up,¹⁴⁰ MLB management has blamed two aspects of the arbitration system for this phenomenon. For one, because arbitrators compare the player in dispute with the performances and salaries of other players in the same relative position, salary arbitration "makes one team pay for another team's extravagance."¹⁴¹ Secondly, the system does not allow arbitrators to consider teams' market sizes, so arbitrators award players of small market teams the same salaries as their large market counterparts.¹⁴²

In reality, both of these complaints revolve around baseball's existence in large and small markets alike. Those teams that have the capacity to pay their players "extravagantly" are the same teams that operate in a "big market."¹⁴³ In the 2004 baseball season, the teams with the three highest payrolls were the New York Yankees (with a record \$180 million-plus payroll), the Boston Red Sox, and the Anaheim Angels.¹⁴⁴ New York and Anaheim have the two largest potential markets in baseball, with the New York and Los Angeles metropolitan areas topping out as the only two markets with more than ten million people.¹⁴⁵ Along with the Big Apple and Southern California, Boston ranks among the nine markets containing five million or more people.¹⁴⁶

¹⁴⁰ ZIMBALIST, *supra* note 96, at 83.

¹⁴¹ *Id.*

¹⁴² *Id.* at 83–84.

¹⁴³ According to Nielsen Media Research, the top ten American television markets of 2004–05 were (from largest to smallest): (1) New York, (2) Los Angeles, (3) Chicago, (4) Philadelphia, (5) Boston, (6) San Francisco-Oakland-San Jose, (7) Dallas-Ft. Worth, (8) Washington, D.C., (9) Atlanta, and (10) Detroit. The 56 NSI Metered Markets (U.S.), Nielsen Media Research, <http://www.nielsenmedia.com/> (last visited Oct. 11, 2005). In 2004, the ten highest team salaries in the Major Leagues were (from highest to lowest): (1) New York (Yankees), (2) Boston, (3) Anaheim, (4) New York (Mets), (5) Philadelphia, (6) Chicago (Cubs), (7) Los Angeles, (8) Atlanta, (9) San Francisco, and (10) St. Louis. ESPN.com, Cleveland Indians 2004 Salaries, <http://sports.espn.go.com/mlb/teams/salaries?team=cle> (last visited Dec. 17, 2005). Detroit was the only metropolitan area with a baseball team that was among the top ten largest televisions markets but not among the top ten highest teams' salaries of 2004. *Id.* The Detroit Tigers team salary was twenty-first among the thirty MLB teams that year. *Id.*

¹⁴⁴ John Donovan, *The Year that Was: Yankees, Cardinals, Tantrums, Milestones Highlighted Regular Season*, SI.COM, Oct. 1, 2004, http://sportsillustrated.cnn.com/2004/writers/john_donovan/09/30/season.review/.

¹⁴⁵ Al Streit, *Baseball Markets*, Baseball Almanac, http://www.baseball-almanac.com/articles/baseball_markets.shtml (last visited Dec. 17, 2005).

¹⁴⁶ *Id.*

No doubt these teams can afford to pay such ridiculously high salaries because they benefit from lucrative media contracts.¹⁴⁷ The New York Yankees made more than \$100 million from television, cable, and radio deals in 2004.¹⁴⁸ By contrast, the average television revenue received by each MLB team is around \$13 million.¹⁴⁹ In addition to existing in larger markets, baseball's richest teams are also more likely to succeed.¹⁵⁰ Six of the eight 2004 MLB playoff teams ranked among the top ten in payroll league-wide.¹⁵¹ The smaller markets simply cannot match the salaries that the bigger teams lay out.¹⁵²

Baseball's salary arbitration scheme fails to take this into account.¹⁵³ Arbitration relies on the salaries and statistics of *all* players regardless of

¹⁴⁷ Richard Sandomir, *Steinbrenner Has Got It, and He Loves to Flaunt It*, N.Y. TIMES, Feb. 17, 2004, at D1.

¹⁴⁸ *Id.*

¹⁴⁹ Mike Vandermause, *Fans Didn't Deserve Hike in Ticket Prices*, MILWAUKEE J. SENTINEL, Apr. 10, 2003, at 3Z (revealing that in 2003 "the amount of national TV revenue that [was] received by each [baseball] team" was "\$12.7 million").

¹⁵⁰ Paul Hoynes, *Money Makes the World Series Go 'Round*, PLAIN DEALER (Cleveland, Ohio), April 3, 2005, at S8.

¹⁵¹ *Id.* The three teams with the highest payrolls—the New York Yankees, the Boston Red Sox, and the Anaheim Angels—were three of the four playoff teams from the American League. *Id.* The Houston Astros (\$75 million) and the Minnesota Twins (\$54 million) were the only playoff teams who were not among the top ten in payroll. *Id.* The Twins were the best "bargain" in the MLB; they paid \$586,957 for each of their ninety-two victories. *Id.* The Yankees paid \$1.8 million—the League-high—for each of their one hundred and one victories. *Id.*

¹⁵² The disparity between baseball's rich and poor teams is staggering. "The combined 2005 salaries of the five projected [New York] Yankee start[ing pitchers] will total \$67 million, which is more than the 2004 payrolls of 18 of the other 29 teams." Phil O'Neill, *Payroll Budgets Spiraling Out of Control*, SUNDAY TELEGRAM (Worcester, Mass.), Jan. 16, 2005, at D6. The payroll of the entire Cleveland Indians team was \$34 million in 2004. Scott Priestle, *Indians, Shapiro Agree on 2-Year Contract Extension*, COLUMBUS DISPATCH, Dec. 23, 2004, at B5. In that same year, the New York Yankees doled out over \$180 million, while the Boston Red Sox disbursed about \$130 million in players' salaries. *Id.* Cleveland's paltry \$34 million was the MLB's fourth-lowest team payroll. *Id.*; see also Jones, *supra* note 66, at 1C (pointing out the "haves and have nots" of the MLB, where "only a handful of teams reasonably expect to vie for a title each season").

¹⁵³ A potential counterargument is that arbitrators should not take the size of the team's market into account, because the value of the player in question is a matter of how the entire MLB values him, not just that particular team. In other words, it would be unfair for an arbitrator to "undervalue" a player from the Cleveland Indians, when the New York Yankees, with higher revenues and spending power than the Indians, would pay that player a higher salary. But the problem with that argument is that it fails to take into account the effect such a system has on the entire MLB. It would be absurd to

where they play.¹⁵⁴ The big market/small market dynamic leads to increasing player salaries across the league, at least in part to the MLB's salary arbitration system.

3. MLB's Final-Offer System: Does it Work?

The crucial question about final-offer arbitration is this: does it work? That is, does the final-offer system really encourage parties to settle and to avoid actual arbitration? In 2005, seventy-nine players filed for arbitration.¹⁵⁵ Thirty-nine of them settled before actually proceeding to arbitration.¹⁵⁶ Between 1990 and 2004, players filed 1469 arbitration cases and only 182 went to arbitration.¹⁵⁷ In other words, baseball players and owners settle about ninety percent of all arbitration cases. Additionally, not all arbitration-eligible players file for arbitration,¹⁵⁸ suggesting that the mere possibility of

require a law firm in Cleveland to pay its attorneys the same salary a law firm in New York City pays its similarly situated attorneys, yet both firms are part of the national legal community. In the attorney market, a lawyer from Cleveland could leave his or her job and take a new, higher paying position in New York, and the result would have very little effect on the salaries of lawyers across America. The same does not happen in Major League Baseball. The player who leaves the Indians for a higher salary with the Yankees creates a new baseline to which arbitrators look as a factor in deciding what a player with similar talents should be paid.

¹⁵⁴ Parties in baseball arbitrations offer salary numbers for comparable players, regardless of those players' current teams. 2003–2006 Basic Agreement between the MLB and MLBPA, *supra* note 107, at art. VI(F)(12)(a). The MLB CBA requires arbitrators to use "comparative baseball salaries" from across the League as a part of the criteria for deciding arbitrations. *Id.* See also Mike Klis, *Twins Lose Koskie to Jays: Third Baseman Gets \$17 Million*, DENVER POST, Dec. 13, 2004, at 9C. In the 2004 off-season, the Minnesota Twins, who are notorious for being a small market team, lost several members of their starting line-up to teams in larger markets. *Id.*

¹⁵⁵ Dennis Brackin, *Twins, Santana are Far Apart; Lefthander is Asking for \$6.8 million*, STAR TRIB. (Minneapolis), Jan. 19, 2005, at 4C. By comparison, sixty-five players filed for arbitration in 2004. *Gagne, Halladay Among 65 Players to File for Arbitration*, THE SPORTS NETWORK, Jan. 15, 2004, <http://www.sportsnetwork.com/default.asp?c=sportsnetwork&page=mlb/news/aan300455.htm>.

¹⁵⁶ Brackin, *supra* note 155, at 4C.

¹⁵⁷ Carrie Muskat, *Free Agency Facts*, MLB.COM, Nov. 2, 2004, http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_news.jsp?ymd=20041102&content_id=908940&vkey=news_mlb&fext=.jsp.

¹⁵⁸ Following the 2004 baseball season, many arbitration-eligible players opted not to file for arbitration. Thirty-nine arbitration-eligible players inked new contracts without actually going to arbitration. Brackin, *supra* note 155, at 4C; see also Gordon Edes, *Varitek Gives a Signal: He Passes on Sox' Arbitration Offer*, BOSTON GLOBE, Dec. 20,

going to arbitration leads clubs (and players, if in their interest) to settle.¹⁵⁹ These statistics reflect that baseball's final-offer system decreases the number of disputes resolved by arbitration.

While the final-offer system encourages players and owners to settle instead of arbitrate, the result—increased player salaries—is the same either

2004, at E2 (noting that two of the arbitration-eligible players from Boston declined arbitration and signed with other teams). Other arbitration-eligible players reached agreements with their teams before filing for arbitration. Juan C. Rodriguez, *Beckett Avoids Arbitration; Pitcher Signs; Marlins Talk to Delgado's Agent*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Jan. 19, 2005, at 9C (noting that Josh Beckett re-signed with the Marlins before going to arbitration).

¹⁵⁹ One factor that could induce settlement is the cost of arbitrations. The cost of MLB arbitrations is typically greater than NHL arbitrations, because professional baseball requires three arbitrators per hearing, while the NHL has used a single-arbitrator system. The AAA supplies arbitrators for most MLB salary arbitrations. American Arbitration Association, Sports Arbitration including Olympic Athlete Disputes, <http://www.adr.org/sp.asp?id=22022> (last visited Dec. 17, 2005). "Arbitration costs through the AAA can be astronomical." Robert J. Miletsky, *How to Make Sure Your Arbitration Clauses Do Exactly What You Want Them to Do*, CONTRACTOR'S BUS. MGMT. REP., February 2005, at 10. Usually, each side pays for their own portion of the arbitration costs. Under the most recent NHL CBA, participants in salary arbitrations are responsible for their "own expense of participation in the arbitration." NHL CBA, *supra* note 73, at art. 12, § 5(n) (noting that "[t]he cost of the arbitration proceedings, including the Arbitrator's fees and expenses, shall be shared equally among the parties"). Since baseball's final-offer system creates results that are much more predictable than hockey's version, these known procedural costs of arbitration make actually proceeding to arbitration that much more illogical. For example, if a player demands a \$1 million salary and his club offers \$500,000, baseball arbitrators will rule for either one or the other salary figure. With the known economic costs of arbitration (i.e., paying for the arbitrators, discovery, and travel costs to and from the arbitration), both parties' incentives favor settlement. On the other hand, in an NHL arbitration without the final-offer system, the outcome of arbitration is much less predictable, so the parties may be more willing to invest greater amounts of money in obtaining a potentially favorably arbitration result. In addition, the cost of NHL arbitrations, which utilize only one arbitrator, should be lower than the expense of MLB arbitrations, which require a three-arbitrator panel. However, NHL arbitrations require full opinions and justifiable awards, so arbitrators who handle NHL cases typically demand higher remuneration per arbitration. Symposium, *Sports Law and Alternative Dispute Resolution*, 3 CARDOZO J. CONFLICT RESOL. 1 (2001), <http://www.cardozojcr.com/vol3no1/symposia.html> (relating that hockey arbitrations result in higher pay for the arbitrator/symposium participant than do baseball arbitrations). Another reason for settling before going to arbitration is a "desire to avoid a public exchange of numbers." Brackin, *supra* note 155, at 4C. Up to a certain deadline, the two sides can negotiate in private. *Id.* Once that deadline passes, the offers of the clubs and the demands of the players become public. *Id.* As with any negotiation with potentially high media and public interest, privacy can play a large role in these pre-arbitration negotiations. *Id.*

way. In 1974, when the MLB first relied on arbitration to settle salary disputes, the average salary in baseball was \$40,839.¹⁶⁰ Today, the average MLB salary is well over \$2 million.¹⁶¹ While the advent of free agency no doubt played a large role in this astronomical rise,¹⁶² free agency's coexistence with arbitration pushes baseball's salaries up even more.¹⁶³

¹⁶⁰ Lindsay, *supra* note 137, at SPORTS.

¹⁶¹ Tom Verducci et al., *The 20 Great Tipping Points; Many of the Most Important Events in Sports over the Past 50 Years Happened Far from any Field or Arena. Let the Countdown begin . . .*, SPORTS ILLUSTRATED, Sept. 27, 2004, at 114, 119.

¹⁶² *Id.* Sports Illustrated ranked the birth of free agency in professional sports as one of the most important events in all of sports from 1954 to 2004. *Id.* The history of free agency in baseball traces its roots back to Curt Flood, a baseball player who made \$90,000 in 1970 for playing for the St. Louis Cardinals. *Id.* In 1970, baseball's reserve clause tied players to teams, and players had no power to choose for whom they played or how much money they made. *Id.* The Cardinals attempted to trade Flood to Philadelphia, and Flood challenged the trade and the reserve clause on anti-trust grounds. *Id.* The case went all the way to the Supreme Court, which ruled against Flood and preserved the reserve clause's exemption from anti-trust laws. Flood v. Kuhn, 407 U.S. 258 (1972). A few years later, in 1975, free agency was born through the Messersmith-McNally Arbitration. Nick Acocella, *Flood of Free Agency*, ESPN CLASSIC, http://espn.go.com/classic/biography/s/Flood_Curt.html (last visited Dec. 17, 2005). Dave McNally, a four-time twenty-game-winning pitcher from the Baltimore Orioles, earned \$100,000 in 1974 before being traded to the Montreal Expos. Abu Abraham, *Deaths of Note*, CHARLESTON DAILY MAIL (W. Va.), Dec. 3, 2002, at P3C. The Expos offered him \$125,000 in 1975, but McNally thought he was worth more. *Id.* He refused to sign with the Expos and instead filed a grievance with Andy Messersmith of the L.A. Dodgers and the Major League Baseball Players Association. *Id.* The arbitrator in the grievance, Peter Seitz, ruled in favor of the players, thereby killing the reserve clause and ushering in the era of free agency on December 23, 1975. *Id.* In 1998, Congress passed the "Curt Flood Act," which partly removed baseball's exemption from federal anti-trust law. See J. Philip Calabrese, *Recent Legislation: Antitrust and Baseball*, 36 HARV. J. ON LEGIS. 531, 540 (1999). Unrestricted free agency began in the NHL in 1994. Damien Cox, *Top 5 Things NHL, Union Should Say (But Won't)*, TORONTO STAR, Sept. 25, 2004, at E2. The NFL instituted free agency for the first time in 1993. *Cornerbacks Pick Off Biggest Pay Increases of Any Position*, BUFFALO NEWS, Feb. 15, 2004, at C8.

¹⁶³ Free agency has given players the power to bargain for higher salaries by removing the reserve clause's barrier to the free market. Jones, *supra* note 66, at 1C (noting that unrestricted free agency constitutes "a free-market system . . . where owners could outbid one another for players," causing salaries to go "through the roof"). But see Dave Sheinin, *This Winter, Free Agents See Less Green*, WASH. POST, Jan. 31, 2004, at D1 (claiming that "the size and length of player contracts have fallen for a second straight offseason"). Due to an apparent decrease in free agency market power, the MLBPA began investigating the owners' "negotiating practices" to see whether they are illegally conspiring to "keep salaries low." *Id.* In the 1980s, MLB owners were actually found guilty of such conspiracy and ordered to pay a \$280 million penalty. *Id.* When free agency started in the NFL in 1993, 132 unrestricted free agents signed fresh contracts

Unrestricted free agents can seek higher salaries from other teams, and restricted free agents who qualify for salary arbitration employ the arbitration system to obtain impressive pay raises.¹⁶⁴ As a result, Major League Baseball's use of salary arbitration has led to a profound increase in player salaries across the league.

D. *The National Hockey League's Salary Arbitration System under the Old CBA (1995–2004)*

1. *The Mechanics of the NHL's Salary Arbitration System*

The MLB and the NHL are the only two of the major four professional sports leagues to have salary arbitration.¹⁶⁵ Due to baseball's tremendous popularity advantage over hockey¹⁶⁶ and the MLB's unique "final-offer"

worth an average of \$1.227 million, which represented a 231% increase from the year before. Kimberly Jones & Steve Politi, *Cap Is King: Patriots, Eagles Master NFL Salary System*, NEWHOUSE NEWS SERVICE (Wash. D.C.), Jan. 31, 2005, at SPORTS, available at LEXIS News Library, NHSNWS File. In that one season, the average NFL salary rose \$104,000 to \$600,000. *Id.* "The highest [team] payroll in 1992 was \$31 million. Two years later, that was the minimum payroll." *Id.*

¹⁶⁴ In 2005, Adam Dunn of the Cincinnati Reds received the MLB's highest pay raise from arbitration, as he netted a 934% increase to \$4.6 million from \$445,000. *Sports Shorts—Red Sox to Issue 500 Series Rings*, THE PROVIDENCE J. (R.I.), Feb. 20, 2005, at C12. The eighty-nine baseball players who went to arbitration in 2005 averaged a pay increase of 123% from those hearings. *Id.*

¹⁶⁵ Kulfan, *supra* note 8, at 6G. On the other hand, the NBA and the NFL both have salary caps. *Id.* As of 2005, the NBA had a "soft cap," which meant that the cap is calculated "as a percentage of league income," and there are "various free-agent exemptions." *Id.* In 2003–04, the NBA cap figured out to \$43.9 million, but the exemptions made the average expenditure \$59 million. *Id.* This means that each NBA team could not spend more than \$43.9 million on players' salaries in 2003–04, but the "softness" of the cap caused the average team to spend \$59 million on salaries that year. *Id.* In 2004, the NFL had a hard cap set at 64.8% of "defined gross league revenues." *Id.* In that year, the maximum each team could spend on salaries was \$80.6 million. *Id.* That year, the NFL also had a salary floor, which was \$67.3 million. *Id.*

¹⁶⁶ Both total yearly attendance and total annual revenues of the MLB and NHL reveal the disparity between the popularity of the two leagues. The MLB attracted a record-high 73,022,969 fans to see games in 2004. Collene Kane, *The Spector of Steroids*, CINCINNATI ENQUIRER, Jan. 16, 2005, at 14B. The NHL's total attendance for 2004 was about 20 million. Kevin Paul DuPont, *This Union Could Use a Few More 'Yes' Men*, BOSTON GLOBE, Feb. 20, 2005, at C11 (quoting interviews with NHL Commissioner Gary Bettman in which he "referred to the total attendance [of the 2004 NHL season]" as being "some 20 million"). Although there are 162 baseball games in a regular season compared to hockey's eighty-two, the total attendance for the two leagues

system of arbitration,¹⁶⁷ professional baseball's handling of salary arbitration is the benchmark from which practitioners and fans judge the NHL's version of arbitration.¹⁶⁸

While baseball's arbitration system typically receives more attention than its NHL counterpart,¹⁶⁹ the NHL was the first professional sports league to use salary arbitration when the League and the players' union included the process in its collective bargaining agreement for the 1970 season.¹⁷⁰ NHL salary arbitration has been renewed with each new collective bargaining agreement, including the seventh and most recent CBA.¹⁷¹

Article 12 of the old NHL CBA governed hockey's use of salary arbitration until the 2004–05 season.¹⁷² Only restricted free agents—i.e., players who still “belonged” to a particular team but who could not renegotiate their contracts with that team—qualified for salary arbitration.¹⁷³ Although the arbitrators' decisions were “final and binding on the parties,” owners retained limited “walk-away rights.”¹⁷⁴ Since the hockey season

is not even close. Compare MLB Team-by-Team Schedule 2005, http://mlb.mlb.com/NASApp/mlb/mlb/schedule/team_by_team.jsp (last visited Dec. 17, 2005) (showing that each team plays 162 games during baseball's regular season), with NHL.com, Teams, <http://nhl.com/lineups/team/index.html> (last visited Dec. 17, 2005) (including team schedules with eighty-two regular season matches). Baseball was also the most popular spectator sport among North Americans in 2004, with over 120 million observers attending MLB, minor league, and college baseball games. Paul Grimaldi, *Still Hot*, PROVIDENCE JOURNAL (R.I.), Jan. 1, 2005, at B1. Just under 60 million people attended NHL, minor league, and college hockey games in that same year. *Id.*

¹⁶⁷ See *supra* Part III(C).

¹⁶⁸ As such, the rest of this Note will build on the discussion of the MLB's final-offer system and focus almost exclusively on the NHL.

¹⁶⁹ Even among NHL players and owners, their focus typically has been on baseball's style of arbitration. Larry Brooks, *Union, NHL Set to Talk*, N.Y. POST, Dec. 9, 2004, at 104. In the final stages of negotiations between the players' union and the owners before the cancellation of the 2004–05 season, the NHLPA offered to change the NHL's arbitration system to mirror the “final offer (either/or) system” of the MLB. *Id.*

¹⁷⁰ ABRAMS, *supra* note 91, at 146.

¹⁷¹ Adrian Dater, *Changes Needed to Save NHL*, DENVER POST, Feb. 15, 2005, at D1 (highlighting the history of the NHL and its labor system); CBA FAQs, *supra* note 29.

¹⁷² NHL CBA, *supra* note 73, at art. 12.

¹⁷³ *Id.* at art. 12, § 1(c).

¹⁷⁴ *Id.* at art. 12, §§ 2(b), 6. After the arbitration concluded and the parties knew the arbitration award, the club could, according to the strict guidelines of CBA Article 12.6, refuse to accept the arbitration and allow the player to approach other teams as a free agent. *Id.*

typically begins mid-October of each year,¹⁷⁵ all arbitration hearings occurred in the first two weeks of August and concluded before August 15.¹⁷⁶

Under the last CBA, only the players were able to file for arbitration.¹⁷⁷ The team ownership, on the other hand, decided “whether the arbitration award shall be for a one or two year contract.”¹⁷⁸ The default term was one year if the club failed to delineate this detail.¹⁷⁹ This provision favored the players because the ruling locked in the players for only one year rather than holding them to a two-year contract.¹⁸⁰ After just one more year, the players could then renegotiate their contracts¹⁸¹ or enter into unrestricted free agency.¹⁸² On the other hand, a default term of two years favored club owners by limiting their players’ ability to match the yearly increase of salaries of other players from around the League.¹⁸³

As with their baseball counterparts, NHL arbitrators were required to take into account various statistics and factors to guide them in making a final decision, including “the Compensation of any player(s) who is alleged to be comparable to the party Player.”¹⁸⁴ The reliance on relative compensation created an undeniable upward spiral effect on players’ salaries

¹⁷⁵ See NHL Schedules, <http://nhl.com/onthefly/schedules/index.html> (last visited Dec. 17, 2005) (listing NHL games for the 2005–06 season from October to June).

¹⁷⁶ NHL CBA, *supra* note 73, at art. 12, § 3.

¹⁷⁷ *Id.* at art. 12 § 1(a) (stating that only “a player is eligible to elect salary arbitration”). This has been a major point of contention between the owners and the union. Alan Hahn, *NHL Lockout; Last Minute to Play . . . ; Today is Likely Final Shot for League, Union to Save NHL Season*, *NEWSDAY* (N.Y.), Feb. 13, 2005, at B13. In its final CBA offer to the NHLPA before canceling the 2004–05 season, the NHL proposed a “two-way [arbitration] system in which a restricted free agent can file for arbitration or a team can take a restricted free agent to arbitration.” *Id.*

¹⁷⁸ *Id.* at art. 12, § 5(b).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ NHL CBA, *supra* note 73, at art. 12, § 5(b).

¹⁸⁴ *Id.* at art. 12, § 5(f). These pieces of evidence also include the following: (1) “the overall performance . . . of the Player in the previous season or seasons,” (2) “the number of games played by the Player” and “his injuries or illnesses during the preceding seasons,” (3) “the length of service of the Player in the League and/or with the Club,” (4) “the overall contribution of the Player to the competitive success or failure of his Club,” (5) “any special qualities of leadership or public appeal,” (6) “the overall performance in the previous season or seasons of any player(s) who is alleged to be comparable to the party Player,” and (7) “the Compensation of any player(s) who is alleged to be comparable to the party Player.” *Id.*

throughout the NHL. Arbitrators had to have some figure regarding the market value of comparable players in order to determine the market value of the player who was party to the arbitration.¹⁸⁵ Such a figure was necessary because NHL arbitrators were free to award *any* salary figure, unlike in Major League Baseball.¹⁸⁶ Since NHL arbitrators had unlimited options, they relied more heavily on comparable players' salaries to decide the arbitrations rather than on the players' demands or the clubs' offers.¹⁸⁷

The result of this heavy reliance on comparable players' salaries was an increase in salaries across the NHL. If one player had a successful year and he negotiated a new contract with a higher salary, comparable players demanded the same higher compensation. One player's increased salary created a boon for comparable players.¹⁸⁸ In NHL arbitration under the old CBA, the key for the player was to prove that he was comparable to another, more highly paid player.¹⁸⁹ The pivotal role that comparable players' salaries played in salary arbitration led to a relative increase in overall salaries.

¹⁸⁵ *Id.*

¹⁸⁶ ABRAMS, *supra* note 91, at 146. Theoretically, NHL arbitrators were bound to the final-offer system of the MLB, the market value of comparable players could play a less important role. In reality, MLB and NHL players are motivated to initiate arbitration based on the performances and salaries of comparable players. Both MLB and NHL arbitrators rely heavily on data regarding comparable players. *See* NHL CBA, *supra* note 73, at art. 12, § 5(m)(2)(e) (detailing that the arbitrator's decision must include "identification of any comparable(s) relied on"); *see also* 2003–2006 Basic Agreement between the MLB and MLBPA, *supra* note 107 (holding that "the criteria [for deciding an arbitration] will be . . . comparative baseball salaries").

¹⁸⁷ In an MLB arbitration, the decision of the arbitrator is relatively easy. The arbitrator picks one or the other number, and has no obligation to explain his or her decision. Under the old NHL CBA, the arbitrator was not bound by the either/or element of the MLB's final-offer system, so he or she could have settled on any salary figure. NHL CBA, *supra* note 73, at art. 12, § 5(m). That the arbitrator had to explain his or her decision in a formal opinion was the limiting factor. *Id.* at art. 12, § 5(m)(ii)(e).

¹⁸⁸ NHL analyst and retired coach Pierre McGuire described arbitration's affect on players' salaries in the following way: "[e]verything just became a big apples to apples thing—and I don't blame the players at all for doing it—they went to their GMs [general managers] and said, 'Hey, that guy got so and so; I'm as good as he is, I want that.'" Dater, *supra* note 171, at D1. McGuire added: "A lot of owners said to themselves, 'Hey, I've got seats to fill and games to win, I have to give him the money.' It all just became a self-fulfilling prophecy that wouldn't stop." *Id.* Once a player receives a higher salary, all comparable players then demand to be paid the same as him, and salaries across the League increase accordingly. *Id.* Then, one of those players has an outstanding year and demands a pay increase. *Id.* That player receives his raise, and the cycle starts all over again, continuously ratcheting up the League's salaries. *Id.*

¹⁸⁹ Comparable players' salaries make up just one of many pieces of evidence submitted in an NHL arbitration under the old CBA. NHL CBA, *supra* note 73, at art. 12,

NHL arbitrators had to decide their cases within forty-eight hours of the end of the arbitration hearings.¹⁹⁰ Moreover, NHL arbitrations required only one arbitrator, while three person panels of arbitrators decide MLB hearings.¹⁹¹ In addition, NHL arbitrators' decisions had to include both the "salary to be paid to the Player by the Club" and "a brief statement of the reasons for the decision, including identification of any comparable(s) relied on."¹⁹² This differed from professional baseball's arbitration rules, which do not provide for any explanation of the arbitrators' decisions.¹⁹³ In baseball, the final-offer element begs little need for such details since MLB arbitrators simply choose between two figures.

2. *The Decisionmakers: How the NHL Chose Arbitrators Under the Old CBA*

A potential distinction between the arbitration systems of hockey and baseball was the selection of arbitrators.¹⁹⁴ Under the old NHL CBA, the League and the NHLPA jointly appointed eight arbitrators who were members of the National Academy of Arbitrators, and only one arbitrator

§ 5(f)(ii) (addressing admissible evidence). However, all of these pieces of evidence are meaningless without a reference point, and comparable players' statistics, including salaries, provided that reference point. For example, arbitrators had to have some vantage point to assess the value of "the overall performance" of a player. *Id.* Without comparable players' salaries and performances, NHL arbitrators would have had no framework with which to craft their decisions.

¹⁹⁰ *Id.* at art. 12, § 5(m).

¹⁹¹ Compare *id.* at art. 12, § 5, (referring to "the Arbitrator" and "the decision of the Arbitrator"), with 2003–2006 Basic Agreement between the MLB and MLBPA, *supra* note 107, at art. 6(F)(7) (providing that "[a]ll cases shall be assigned to three-arbitrator panels").

¹⁹² NHL CBA, *supra* note 73, at art. 12, § 5(m)(i). While those comparables *may* come from players in smaller markets, the overwhelming incentive of the players was to present evidence of a large market player who made more money than, but who performed roughly on par with, the player whose salary was in dispute. NHL arbitrators did not pick what the evidence at the hearing would be; rather, the parties presented all of the evidence upon which the arbitrators had to rely to make their decisions. *Id.* § 5. This was another reason for the often large disparity between the clubs' offers and the players' demands.

¹⁹³ ABRAMS, *supra* note 91, at 146–47.

¹⁹⁴ Michael H. LeRoy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249, 265 (2003) (noting that "the method of an arbitrator's appointment caused courts to vacate awards" and that "[e]ven if such selection did not bias the arbitrator, courts viewed it as an inherent conflict of interest").

decided each case.¹⁹⁵ Likewise in the MLB, the owners and players' association "annually select the arbitrators."¹⁹⁶ But MLB arbitrations are "assigned to three-arbitrator panels."¹⁹⁷

In a system of arbitration, a potential issue can be the procedure for selecting the arbitrators and the concern over the "repeat-player phenomenon."¹⁹⁸ For three reasons, the arbitrator-selection processes in both the MLB and the NHL (under the old CBA) avoided these potential problems. First, in both leagues, the opposing sides—the owners and the players—equally shared the ability to choose arbitrators.¹⁹⁹ Second, the two sides in each league split the costs of the arbitrations, including paying the arbitrators.²⁰⁰ Finally, NHL and MLB arbitrations involved repeat-players on both sides of the hearing, so neither side had an advantage.²⁰¹ Therefore, by

¹⁹⁵ NHL CBA, *supra* note 73, at art. 12, § 2(e)(ix).

¹⁹⁶ 2003–2006 Basic Agreement between the MLB and MLBPA, *supra* note 107, at art. VI(F)(7). "In the event they are unable to agree by January 1 in any year, they jointly shall request that the American Arbitration Association furnish them lists of prominent, professional arbitrators." *Id.* Once the parties had that list, they alternated in "striking names" from the list until a mutually agreeable group remained. *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, 1997 BYU L. REV. 591, 619–24 (1997) (relating repeat-players' advantages in negotiating contracts); Mark Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 110–12 (1974). See generally Lisa B. Bingham, *On Repeat Players, Adhesion Contracts, and the Use of Statistics on Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 258–59 (1998). The concern is, if one party always picks the arbitrator(s), the arbitrator(s) will tend to favor that party. Additionally, a repeat-player has an institutional knowledge advantage over the arbitration neophyte.

¹⁹⁹ NHL CBA, *supra* note 73, at art. 12, § 2(e)(ix); 2003–2006 Basic Agreement between the MLB and MLBPA, *supra* note 107, at art. VI(F)(7).

²⁰⁰ NHL CBA, *supra* note 73, at art. 12, § 5(n). "The cost of the arbitration proceedings, including the Arbitrator's fees and expenses, shall be shared equally among the parties." *Id.*; 2003–2006 Basic Agreement between the MLB and MLBPA, *supra* note 107, at art. VI(F)(11). "The Player and Club shall divide equally the costs of the hearing." *Id.*

²⁰¹ In a repeat-player problem, the advantage/bias arises when one party is constant (i.e., the "repeat-player") and the other party arbitrates once or only a few times. Although the teams are individual parties to arbitrations in both the MLB and the NHL (under the old CBA), they are "repeat-players" who deal with arbitrations on a yearly basis. The players also file for arbitration as individuals, but they receive representation from the players' union, which is also a "repeat-player." NHL CBA, *supra* note 73, at art. 12, § 5(d) (stipulating that a "[p]layer shall be represented at the hearing by the

the terms of their respective collective bargaining agreements, both the MLB and the NHL (under the old CBA) avoided potential problems in the selection of arbitrators.

3. The NHL's Unique "Walk-Away" Provision

The last distinction of the NHL's old salary arbitration system was that NHL arbitrations were not always final; the CBA provided owners limited "walk-away rights."²⁰² The walk-away right meant that arbitrations could have been appealed in certain circumstances,²⁰³ which differed from the absolute finality of the MLB's salary arbitrations.²⁰⁴ The old CBA dealt with one and two-year arbitration decisions differently in regards to walk-away rights.²⁰⁵ If a team's ownership chose to arbitrate a player's salary on a one-year contract, the ownership had the option of walking away from the arbitration within seventy-two hours after the arbitrator announced his or her decision.²⁰⁶ Once the club did so, the player automatically became an unrestricted free agent, except in two circumstances.²⁰⁷ First, if the player accepted from another team an offer that was less than eighty percent of the award from the arbitration with the original club, the original club could elect to match the offer of the other team.²⁰⁸ Second, under certain circumstances and after the club had walked away from the arbitration, the player could have elected to accept the original club's "qualifying offer" for one year and become a free agent at the end of that term.²⁰⁹

If a team's ownership chose to arbitrate for a two-year contract, the ownership could again walk away from the arbitration decision within seventy-two hours of the announcement of the arbitration result.²¹⁰ The difference, however, was the result of the team's walking away. If a club walked away from a two-year arbitration decision, the player and the team

NHLPA"); 2003–2006 Basic Agreement between the MLB and MLBPA, *supra* note 107, at art. VI(F)(3).

²⁰² NHL CBA, *supra* note 73, at art. 12, § 6.

²⁰³ NHL arbitrations are binding unless the team walks away. *Id.*

²⁰⁴ See Dworkin, *supra* note 123, at 78.

²⁰⁵ NHL CBA, *supra* note 73, at art. 12, § 6.

²⁰⁶ *Id.* at art. 12, § 6(a).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at art. 12, § 6(c)(i).

²⁰⁹ *Id.* at art. 12, § 6(c)(ii).

²¹⁰ *Id.* at art. 12, § 6(b).

had to enter into the one-year contract under the terms of the arbitration, and the player became an unrestricted free agent at the end of that one year.²¹¹

Thus, walking away from an arbitration decision on a two-year contract, as opposed to a one-year contract, created different results. Clubs could not fully walk away from arbitration on two-year contracts. They were stuck with the arbitration for a full year. This system yielded various incentives, including the incentive for a club unsure of losing the arbitration hearing to elect to arbitrate a one-year contract.²¹² In choosing to arbitrate a one-year deal, the club preserved full walk-away rights.

The final important aspect of the NHL's walk-away right was the limit on the total number of times a club could exercise the right.²¹³ Teams could walk away from arbitration decisions no more than three times in any two consecutive NHL years and no more than two times in a single arbitration season.²¹⁴ The cap on walk-away rights encouraged teams to exercise the option sparingly. Since there was no limit to the number of restricted free agents on each team who could elect arbitration, the walk-away cap could have played a significant role in clubs' arbitration strategy.²¹⁵

4. *The Latest Round of NHL Salary Arbitrations: Demonstrating How the Old CBA's Arbitration System Malfunctioned*

Although the 2004 NHL season did not commence as originally scheduled, off-season salary disputes during the summer of 2004 continued as usual.²¹⁶ From August 1 to 15, 2004, arbitrators heard all of the League's arbitration cases in Toronto.²¹⁷ Arbitrators heard and decided nineteen

²¹¹ *Id.*

²¹² By choosing to arbitrate for a one-year contract, the franchise could still walk away from the arbitrator's decision, if the club so chose. *Id.*

²¹³ NHL CBA, *supra* note 73, at art. 12, § 6(d).

²¹⁴ *Id.*

²¹⁵ In 2004, the Buffalo Sabres had the most players file for arbitration, eight. TSN.ca, 2004 Arbitration Cases, <http://www.tsn.ca/nhl/feature.asp?fid=7545> (last visited Dec. 17, 2005). The cases of only two of those players, Martin Biron and Daniel Briere, ended in actual arbitration. *Id.* The six others settled before their hearings. *Id.* Given the low cap on a team's ability to walk away from the arbitrators' decisions, a team with eight potential arbitrations must exercise the walk-away right with the other arbitrations in mind.

²¹⁶ *Id.*

²¹⁷ *Id.*

disputes.²¹⁸ Sixty-six players filed for arbitration, and the remaining forty-seven cases settled before going to arbitration.²¹⁹

Table 1: 2004 NHL Salary Arbitration Cases at a Glance

	<u>#</u>	<u>% of total</u>
Players filing for arbitration:	66	100
Disputes settled before arbitration:	47	71.2
Cases decided by arbitrators:	19	28.8

Source: TSN.ca, 2004 Arbitration Cases,
<http://www.tsn.ca/nhl/feature.asp?fid=7545> (last visited Sept. 18, 2005).

These numbers immediately reflect that, at least in theory, the NHL's system operated as it should. The MLB's "final-offer" system, by its very structure, encourages players and owners to settle before going to arbitration. Since the NHL did not use the final-offer system, players and owners should have resorted to arbitration more frequently than their baseball counterparts. Since 1990, 1469 baseball players have filed for arbitration, and only 182 went before arbitrators.²²⁰ Roughly ninety percent of the cases settled before arbitration.²²¹ Of the 108 potential MLB arbitrations in 2004, only seven actually went to hearing.²²² On the other hand, about twenty-eight percent of NHL cases typically end in arbitration.²²³

Baseball's high settle rate was the subject of much interest on the part of the NHL owners during the 2004–05 lockout.²²⁴ Owners felt that players and agents held too much influence over the arbitration procedures of the old

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Muskat, *supra* note 157.

²²¹ *See id.*

²²² MLB.com, 2004 Salary Arbitration Figures, http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_news.jsp?ymd=20040120&content_id=629358&vkey=news_mlb_nd&fext=.jsp (last visited Dec. 17, 2005).

²²³ 2004 Arbitration Cases, *supra* note 215; *see also* Table 1, *supra* p.42.

²²⁴ Brooks, *supra* note 169, at 104 (noting that the NHL owners tried to alter the CBA to implement a MLB-like final-offer system in the NHL).

CBA²²⁵ and complained that the NHLPA won the majority of arbitration cases.²²⁶ As a result, NHL owners pushed for a final-offer system to replace the traditional arbitration procedures that the NHL used for decades.²²⁷ The results of the latest round of arbitrations undoubtedly encouraged owners to change the system. In 2004, the nineteen arbitrations yielded an average award of \$3.12 million.²²⁸ Less than ten years ago the *highest paid* NHL player earned \$5.5 million.²²⁹

While NHL owners at least recognized that there was something seriously wrong with the League's salary arbitration system, baseball's final-offer model would not slow the growth of the NHL players' salaries. Although the NHL and MLB have used somewhat different arbitration systems over the years, the result has been the same in both leagues: skyrocketing salaries.²³⁰ The NHL need only look to the rising average and highest salaries in professional baseball to see that the MLB's arbitration works no better than the NHL's in keeping player salaries in check. Baseball players' salaries have multiplied along with those in the NHL.²³¹ The MLB system may encourage more settling and less arbitrating, but the product of the two leagues' systems is the same. Moving to a final-offer system is a myopic suggestion that would fail to ameliorate the NHL's systemic problem.

²²⁵ CBC Sports, Arbitration, <http://www.cbc.ca/sports/indepth/cba/issues/arbitration.html> (last visited Dec. 17, 2005).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ 2004 Arbitration Cases, *supra* note 215.

²²⁹ Sassone, *supra* note 61, at Sports 1.

²³⁰ Kulfan, *supra* note 8, at 6G. The highest paid player in baseball in 2004 was Manny Ramirez, who made \$22.5 million, while his NHL counterparts were Peter Forsberg and Jaromir Jagr, who each earned \$11 million. *Id.* In the 2005 baseball off-season, Roger Clemens, age forty-two, became the highest-paid pitcher in MLB history. Guy Curtright, *Clemens Gets His Payday*, ATLANTA J.-CONST., Jan. 22, 2005, at 3D. He filed for arbitration, asking for \$22 million, while his team, the Houston Astros, offered a figure of \$13.5. *Id.* The two sides settled, however, for a one-year, \$18 million deal. *Id.* The breakdown of Clemens's salary reveals the staggering state of players' salaries in professional sports. *Id.* If Clemens matches his performance from 2004, he would make \$1 million per win in 2005. Put differently, he would make \$83,994 for every inning he pitches. *Id.* This story is a great example of how baseball's salary arbitration system would fail to ameliorate the NHL's woes. Clemens and the Astros settled, as the final-offer system encourages participants to do. However, the result was a record-breaking salary figure. *Id.*

²³¹ Kulfan, *supra* note 8, at 6G.

*E. The National Hockey League's Salary Arbitration System under the New CBA (2005)*²³²

1. The Mechanics of the NHL's Salary Arbitration System Under the New CBA

Salary arbitration remains unchanged under the new CBA, except in two regards.²³³ First, players are eligible for salary arbitration after four years in the League instead of three.²³⁴ This provision favors the owners and signals their intent to decrease the prevalence of arbitration and its effects on players' salaries.

The other change that the new CBA makes to arbitration relates to who can elect arbitration. For the first time in the history of NHL salary arbitration, teams also have the right to elect salary arbitration.²³⁵ For players who earn more than \$1.5 million in their prior year, teams have the right to elect arbitration in lieu of making a "qualifying offer."²³⁶ Teams also have the right to elect salary arbitration with respect to other certain restricted free agents who choose not to take the team to arbitration.²³⁷

The new CBA's qualifying offer system should increase players' salaries at a modest rate, while keeping players from resorting to arbitration. Players earning \$660,000 or less are entitled to qualifying offers ("QOs") at one-hundred and ten percent of their prior year's salary.²³⁸ Players earning more than \$660,000 and up to \$1 million are entitled to QOs at 105 percent of their

²³² As of December 18, 2005, the NHL had not released the text of the new CBA. See NHLPA.com, Collective Bargaining Agreement, <http://www.nhlpa.com/CBA/index.asp> (last visited Dec. 18, 2005) (noting that the "new collective bargaining agreement will be made available here in the near future"). Until the NHL released the full contents of the new CBA, it provided a website that highlights many of the CBA's important provisions. See CBA FAQs, *supra* note 29. As a result, this section will refer to the answers the NHL provided on that website, rather than referring to specific portions of the CBA. The wording of the CBA may differ from the NHL's CBA FAQs website, but the essential principles will likely be the same.

²³³ CBA FAQs, *supra* note 29.

²³⁴ *Id.*

²³⁵ *Id.* Since the beginning of salary arbitration, the NHL has had player-only election of salary arbitration. This right is somewhat limited; however, teams may elect to arbitrate the salaries of only two classes of players. *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ CBA FAQs, *supra* note 29.

prior year's salary.²³⁹ Finally, players earning more than \$1 million are entitled to QOs at 100 percent of their prior year's salary.²⁴⁰

These amendments to the old CBA's salary arbitration system should help make the process more equal between owners and players. Since teams can elect arbitration in some circumstances, they will have the potential of lowering highly-paid players' salaries when those players are not performing to their potential.²⁴¹ Besides these minimal alterations, the new CBA leaves salary arbitration untouched.²⁴² However, as the following analysis shows, other provisions of the new CBA render further changes to salary arbitration rules unnecessary.

2. Other Provisions of the New CBA and How They Relate to Salary Arbitration

As with the old CBA, the NHL's new system of salary arbitration exists within the broader context of the entire collective bargaining agreement. The pertinent parts include: (1) players' League revenue share; (2) team salary caps and floors, (3) maximum and minimum individual player salaries, (4) team revenue sharing, and (5) free agency.²⁴³

The first major step that the NHL took with the new CBA involves guaranteeing a players' share of League revenues from each year.²⁴⁴ The players' share will be fifty-four percent to the extent League revenues in any year are below \$2.2 billion; fifty-five percent when League revenues are between \$2.2 billion and \$2.4 billion; fifty-six percent when League revenues are between \$2.4 billion and \$2.7 billion; and fifty-seven percent when League revenues in any year exceed \$2.7 billion.²⁴⁵

These guarantees seem to favor the players at first glance. However, during the 2002–03 season, the NHL spent seventy-five percent of League

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* The CBA limits teams' ability to do this only with players who earn more than \$1.5 million in the previous year or those restricted free agents who qualify. *Id.*

²⁴² *Id.* There was some speculation that the NHL would emerge from the lockout with a baseball-style final-offer system, but these predictions proved incorrect. Brooks, *supra* note 169, at 104 (noting that the NHL owners tried to alter the CBA to implement a MLB-like final-offer system in the NHL).

²⁴³ CBA FAQs, *supra* note 29. The other parts of the new CBA will likely have a minimal effect on, or be minimally affected by, salary arbitration.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

revenues on players' salaries.²⁴⁶ The NHL has not spent fifty-seven percent of its revenues on player costs since 1994.²⁴⁷ The players' share appears to represent a significant step backwards. The NHL is attempting to use this provision to curb player costs that spiraled out of control during the life of the last CBA.

While this provision makes good business sense, the players' share is based on unrealistic League revenues. The new CBA's baseline for League revenues is a quixotic \$2.2 billion.²⁴⁸ During the NHL's last season of operation, the League did not even make a profit, let alone a multi-billion dollar one.²⁴⁹ Although the NHL's hopes on its future are high, these revenue projections look unrealistic. The League will likely need to adjust these figures in the near future.

The CBA's limitation of the players' share of League revenues relates to salary arbitration because salary arbitration has played a pivotal role in pushing players' salaries up.²⁵⁰ Arbitration under the old CBA inflated players' salaries without a real limit.²⁵¹ However, under the new CBA, the limitation on the players' share of League revenues creates somewhat of a cap on the augmenting effect that arbitration can have on players' salaries.²⁵²

This limitation on salary growth is displayed no more prominently than in the new CBA's imposition of a team salary floor and cap.²⁵³ Under the new CBA, the payroll range for each franchise in season one (2005–06) is \$21.5 million to \$39 million.²⁵⁴ The salary range should help create more parity among the League's teams, but more importantly, the hard salary cap

²⁴⁶ See 2002–03 URO, *supra* note 27.

²⁴⁷ Loftus, *supra* note 54, at 47.

²⁴⁸ CBA FAQs, *supra* note 29.

²⁴⁹ 2002–03 URO, *supra* note 27.

²⁵⁰ See *supra* Part III.D.

²⁵¹ CBA FAQs, *supra* note 29.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* The franchise's "payroll" includes all salaries, signing bonuses, and performance bonuses paid to players. *Id.* Except in the case of a bona fide long-term injury (injuries that sideline a player for a minimum of twenty-four days and ten games) to one or more of a team's players, team payrolls will never be permitted to be below the minimum or in excess of the maximum. *Id.* Team's at or near the upper limit that have players who incur a bona fide long-term injury are entitled to replace up to the full value of the injured player's NHL salary (even if such salary would result in the team's salary exceeding the cap). *Id.* The "replacement salary" does not count against the team's cap, but will count against the League-wide players' share. *Id.* Upon return of the injured player, the team must come into immediate compliance with the requirements of the payroll range. *Id.*

will effectively restrain players' salaries.²⁵⁵ The pitfall of the NHL's salary arbitration scheme under the old CBA was that player-friendly arbitration artificially inflated salaries across the League without any real restraint.²⁵⁶ The new CBA's hard salary cap will effectively eliminate this problem.

Similarly, the new CBA's cap on individual player salaries will curtail the inflationary effects of salary arbitration.²⁵⁷ Under the old CBA, one aspect of salary arbitration that tended to increase players' salaries League-wide was the relative nature of arbitrators' decisions combined with the lack of a cap on individual salary awards.²⁵⁸ The new CBA ameliorates this problem by regulating the maximum amount that any one player may make on each team.²⁵⁹

Another aspect of the new CBA that will help control arbitration's effect on player salaries is revenue sharing.²⁶⁰ By committing itself to revenue sharing, the NHL has recognized that a significant revenue discrepancy exists among its franchises and that the relative sizes of television markets are the main cause of this incongruity.²⁶¹ Not only does revenue sharing help smaller market teams compete on more equal footing with their larger market foes; it

²⁵⁵ The lack of a salary cap was certainly the main failure of the previous CBA. Players' salaries exploded across the League from 1994–2004. Loftus, *supra* note 54, at 47. The League's average salary in 1994 was \$560,000 and grew to \$1.8 million by 2004. *Id.*

²⁵⁶ See *supra* Part III.D.

²⁵⁷ CBA FAQs, *supra* note 29. Under the new CBA, no player is eligible to contract for or receive in excess of twenty percent of his team's upper limit in total annual compensation (NHL salary plus signing, roster, reporting, and all performance bonuses). *Id.* Put in terms of the 2005–06 salary cap figures, the CBA prohibits players from contracting for total compensation in excess of \$7.8 million in any year of his contract. *Id.* This represents a significant departure from the previous unlimited salary scheme of the old CBA. In 2004 alone, the two highest-paid NHLers, Peter Forsberg and Jaromir Jagr, earned \$11 million each. Kulfan, *supra* note 8, at 6G. To bring these and other contracts in line with the new CBA, it eliminated all contracts signed for the 2004–05 season. CBA FAQs, *supra* note 29. The NHL essentially started the 2005–06 season with a clean slate.

²⁵⁸ See *supra* Part III.D.

²⁵⁹ CBA FAQs, *supra* note 29. The new CBA also sets the minimum League salary at \$450,000 for the 2005–06 and 2006–07 seasons. *Id.* This provision will help to decrease the disparity between the highest-paid and lowest-paid players.

²⁶⁰ *Id.* The League committed itself to enhanced revenue sharing in an amount that is "necessary to allow all Clubs the ability to afford competitive payrolls within the payroll range." *Id.*

²⁶¹ All teams that: (1) are ranked in the bottom half in League revenues, and (2) operate in markets with a "demographic market area" of 2.5 million or fewer television households are eligible for revenue sharing. *Id.*

should create some parity among teams with regard to salary arbitration. Under the old CBA, arbitrators did not take into account a team's market size when deciding arbitrations.²⁶² As a result, lower-paid players from smaller market teams compared themselves to higher-paid players from larger market franchises, and arbitrators used these comparables to award the players from smaller market teams higher salaries, even if their teams did not have the revenue to support such costs.²⁶³ Revenue sharing should help small market teams match the salaries of their large market counterparts. Under the old CBA, revenue sharing such as this would worsen arbitration's inflationary effect on salaries, however, the new CBA's salary cap will help keep this phenomenon under control.

The final element of the new CBA that affects salary arbitration is "free agency."²⁶⁴ As previously noted, free agency essentially creates a free market of players.²⁶⁵ Free agents put their talents up for sale and sign with the team that offers them the best price, which was basically the effect of salary arbitration under the old CBA.²⁶⁶ Continuing free agency in the manner of the old CBA pushes salary arbitration closer to total irrelevance in the NHL. If players can become free agents and obtain the best salary the market will afford, salary arbitration—as the NHL has instituted it—becomes an extraneous institution, a procedural dinosaur of the early 1970s. While the new CBA did not drastically change salary arbitration, the new salary cap and the limitation of players' share of League revenues make such alterations to arbitration needless.

IV. HOW TO CHANGE THE NHL'S SALARY ARBITRATION SYSTEM: WHAT THE NHL COULD HAVE DONE WITH THE NEW CBA AND THE FUTURE OF ARBITRATION IN THE NHL

The cancelled season of 2004–05 provided the NHL with an opportunity to change or eliminate its arbitration system in the interests of the League's

²⁶² See *supra* Part III.D.

²⁶³ *Id.*

²⁶⁴ CBA FAQs, *supra* note 29. There are two classes of free agents, unrestricted and restricted. *Id.* Unrestricted free agents in the 2005–06 season are those players age thirty-one with four accrued seasons. *Id.* Restricted free agency operates similarly to how it operated under the old CBA. *Id.*

²⁶⁵ See *supra* Part III.D.

²⁶⁶ *Id.* Salary arbitration under the old CBA allowed players who were still under contract to "renegotiate" their contracts by filing for arbitration, almost always receiving a higher salary.

future.²⁶⁷ Over the previous decade salary arbitration played a central role in the massive expansion of players' salaries, and thus, the financial demise of the NHL.²⁶⁸ The central problem with salary arbitration under the old CBA was its unregulated use of "comparables" to determine arbitration awards in a general system without any limits on players' salaries.²⁶⁹ The NHL had three basic options for amending the arbitration system and stopping its negative effects on the League's viability: eliminating salary arbitration altogether, altering the specific rules of arbitration, or imposing a salary cap.

First, since the previous CBA ran out in its entirety,²⁷⁰ the NHL could have eliminated the salary arbitration system altogether. Although it seems like a radical proposition, professional hockey could have adopted a new CBA without salary arbitration. After all, the MLB and NHL are the only two major professional sports leagues with arbitration.²⁷¹ The NBA and NFL do not have any arbitration at all.²⁷² With an effective free agency system, the NHL could flourish without arbitration. In addition, having no arbitration could give players and owners the incentive to enter short-term deals, which are less risky and more reflective of the players' actual worth. Arbitration is a potentially unnecessary bargaining chip that typically favors the players.²⁷³

²⁶⁷ Elliott, *supra* note 5, at D1.

²⁶⁸ The NHL owners were right to look to salary arbitration as a part of the CBA that needed serious overhauling. Hahn, *supra* note 177, at B13 (noting that the owner's last offer to the NHLPA before canceling the 2004–05 season included modifications to the salary arbitration system).

²⁶⁹ See *supra* Part III.D.

²⁷⁰ The CBA expired on September 15, 2004, per its terms. See NHL CBA, *supra* note 73, at art. 3, § 1(a). Both sides had to agree to an entirely new CBA. This task was the focus of the failed labor negotiations of the cancelled 2004–05 season. Alan Hahn, *Season is Over Before It Starts; Bettman Pulls Plug After NHL and Union are Unable to Reach Agreement on Cap Number*, *NEWSDAY* (N.Y.), Feb. 17, 2005, at A86.

²⁷¹ Kulfan, *supra* note 8, at 6G.

²⁷² *Id.* The NFL and NBA rely on a free agency system devoid of any salary arbitration. *Id.* Although salaries in both of those leagues have risen steadily in the past decade, they have not experienced the explosive salary increases of the Major Leagues and the NHL. Damon Hack, *In N.F.L., Players Have Voice that Even the Owners Listen to*, *N.Y. TIMES*, Dec. 24, 2004, at D1. While the three other leagues (including the MLB) can arguably handle exponential increases in player costs, the NHL simply does not have the revenue base to follow suit and stay financially solvent. Bob Smizik, *Bettman Deserves Applause*, *PITTSBURGH POST-GAZETTE*, Feb. 21, 2005, at D-1 (noting "[t]he absolute need for a salary cap [in the NHL] can't be overstated").

²⁷³ In the NHL, owners conceded to allow salary arbitration before free agency existed in that League. See BERRY ET AL., *supra* note 91, at 209–11. The NHL owners caved to the players' demand for arbitration after the 1969 season. *Id.* at 209. The first season of free agency in the NHL was 1972. *Id.* at 211. Major League Baseball instituted

Unlike free agency, which is considered essential to professional sports,²⁷⁴ arbitration is dispensable. The NFL is the most successful major sports league,²⁷⁵ and yet it exists without arbitration.²⁷⁶ But for the protests of the NHLPA, the NHL's new CBA could have eliminated salary arbitration altogether.

Besides a whole-scale departure from arbitration, the NHL could have utilized several specific rules changes to arbitration. First, the old CBA allowed only players to file for arbitration; the owners had no such option.²⁷⁷ Under the old CBA, when an eligible player believed his worth to be more than his current salary, he reserved the option of filing for arbitration to receive higher pay through an arbitration award.²⁷⁸ However, when an owner felt that a potentially eligible player was underperforming, he did not have the option of filing for arbitration to possibly *lower* that player's salary. With some limitation, the new CBA now allows teams to file for arbitration as well.²⁷⁹ Giving the owners such an option could create parity in the system.

salary arbitration in 1973, but the owners did not submit to free agency until the end of 1975. STAUDOHAR, *supra* note 92, at 41. In none of the major four professional sports leagues has salary arbitration been adopted *after* free agency. See BERRY ET AL., *supra* note 91, at 63. The two leagues without arbitration, the NFL and NBA, have flourished in a system of free agency without arbitration. Kulfan, *supra* note 8, at 6G.

²⁷⁴ Professional baseball players fought for years for free agency. See *Flood v. Kuhn*, 407 U.S. 258 (1972) (upholding Major League Baseball's exemption from antitrust laws and preventing the institution of free agency). All four major professional leagues have had free agency for years, and there is no indication that any of the leagues will abrogate this player-friendly system. Kulfan, *supra* note 8, at 6G.

²⁷⁵ Kulfan, *supra* note 8, at 6G (listing the NFL's estimated annual revenue as approximately \$1 billion more than the next richest league).

²⁷⁶ *Id.* (noting that the NFL and NBA do not have salary arbitration). Granted, the NFL enjoys a popularity that the NHL will simply never have. Michael Farber, *The Death of the NHL and Its Plan for Resurrection*, SPORTS ILLUSTRATED, Feb. 21, 2005, at 60. The lack of interest in hockey as a participant sport is a major, insurmountable problem for the NHL in the United States. *Id.* at 63. "Everyone who has ever been in phys-ed class has shot a basketball and played a form of baseball or football—organic sports in the American experience—but probably never has tried hockey." *Id.* "The NHL starts 50 lengths back [from the NFL, NBA, and MLB]." *Id.* While the NHL will never be as popular as a giant like the NFL, the NHL must recognize this fact and adjust its labor system and business model in order to return the League to financial viability.

²⁷⁷ NHL CBA, *supra* note 73, at art. 12, § 6.1(a) (stipulating that "[a] player [and only a player] is eligible to elect salary arbitration if the player meets certain 'qualifications'").

²⁷⁸ Arbitration allows a player, who has time remaining on his current contract, to renegotiate that unfinished term, based on his most recent contributions to the team. See NHL CBA, *supra* note 73, at art. 12, § 1.

²⁷⁹ CBA FAQs, *supra* note 29.

Owners could potentially lower players' salaries through arbitration as often as the players obtain higher salaries from player-initiated arbitration.

Second, the NHL could have constricted the criteria for eligibility, making arbitration less frequent. This represents the other slight change that the new CBA made to the old salary arbitration rules.²⁸⁰ In the MLB, most situations require both the player and the team to consent to arbitration.²⁸¹ Recently, the NHL CBA had much more relaxed standards of eligibility.²⁸² Players as young as twenty-three could qualify for arbitration.²⁸³ While players with as little as three years of tenure in the NHL could file for arbitration under the old CBA, the new CBA raises the minimum tenure to four years.²⁸⁴ By further limiting the potential number of players who could file for arbitration, the NHL could have significantly restricted arbitration's influence on salaries. The new CBA's rules on eligibility represent a very slight change and should have a marginal effect on the volume of players who file for arbitration.

Third, the NHL could have mirrored the MLB's final-offer system of arbitration; however, this would not have solved the NHL's arbitration woes

²⁸⁰ *Id.*

²⁸¹ See Kulfan, *supra* note 8, at 6G.

²⁸² In the NHL, a player qualifies to elect salary arbitration if he is a restricted free agent and has a certain minimal level of experience in the League. See NHL CBA, *supra* note 73, at art. 12, § 1. In most situations in the Major Leagues, either the player or the club may elect arbitration, "provided the other party to the arbitration consents thereto." 2003–2006 Basic Agreement between the MLB and MLBPA, *supra* note 107, at art. VI(F)(1).

²⁸³ See NHL CBA, *supra* note 73, at art. 12, § 1(a). Under the terms of the CBA, a player who first signed an NHL contract at age eighteen needed only five years of League experience to qualify for arbitration. *Id.* In the MLB, players with at least three years of experience can qualify for arbitration. 2003–2006 Basic Agreement between the MLB and MLBPA, *supra* note 107, at art. VI(F)(1). However, given that most professional baseball players have some college experience and also spend time developing in the minor leagues, the youngest baseball players who qualify for arbitration tend to be significantly older than their NHL counterparts. In 2001, the MLB team with the youngest average roster was the Minnesota Twins, with a mean age of 27.147. *Stat Corner*, ST. LOUIS POST-DISPATCH, Apr. 9, 2001, at D8. The highest average age, 31.272, belonged to the Arizona Diamondbacks. *Id.* On Opening Day of 2002, the average age of all Major League players was 29.67. Tony Massarotti, *Baseball: Covering All Bases; Pedro Won't Throw Caution to the Wind*, BOSTON HERALD, Apr. 7, 2002, at B06. In 2004, the average age in the NHL was 27.9. Pierre Lebrun, *Lockout Could Mean Forced Retirement for Older NHLers*, PORTAGE DAILY GRAPHIC (Man., Can.), Jan. 22, 2005, at 9. Nineteen year-old Rick Nash of the Columbus Blue Jackets led the NHL in goals scored in 2004. Brian Biggane, *Youngsters Quickly Make Mark*, PALM BEACH POST (Fla.), May 2, 2004, at 3B.

²⁸⁴ See NHL CBA, *supra* note 73, at art. 12, § 1.

on its own. Baseball's salaries have exploded just as much as (and perhaps even more than) hockey's salaries.²⁸⁵ Baseball players, just like their hockey counterparts, win arbitrations even when the owners technically "win" their arbitrations.²⁸⁶ Simply filing for arbitration or being eligible to file for arbitration leads to increased salaries in both the MLB and NHL.²⁸⁷ The NHL owners eventually abandoned their desires to institute a final-offer arbitration system, and instead focused their energies on instituting a hard salary cap.²⁸⁸

Fourth and finally, the NHL could have limited individual arbitration awards. Under the old CBA, hockey arbitrators could award any salary amount that they thought was best.²⁸⁹ In doing so, they had only to provide a brief statement of the reasons for the decision, including identification of any comparable(s) relied on.²⁹⁰ Otherwise, arbitrators were free to award any salary number.²⁹¹ While the players' demands and the owners' offers created a perfunctory framework for the arbitrators, there was no cap on the arbitrators' decisions.²⁹² Such a cap could have significantly curbed the upward effect that arbitration had on salaries.

More effective than a cap on individual arbitration awards is a cap on team salaries League-wide, which is exactly what the NHL instituted with its

²⁸⁵ See Kulfan, *supra* note 8, at 6G.

²⁸⁶ Dworkin, *supra* note 123, at 79.

²⁸⁷ *Id.*

²⁸⁸ See Elliott, *supra* note 5, at D1. This compromise seemed essential to get the players back on the ice. The haggling between players and owners eventually had to stop, otherwise the lockout could have affected future seasons as well as the cancelled 2004–05 term. Helene Elliott & Chris Foster, *Union Says No to Latest NHL Plan*, L.A. TIMES, Feb. 3, 2005, at D3 (reporting that the NHLPA continued to reject any NHL proposal to change the 2003–04 season's salary system); Tim Panaccio, *NHL Season in Deep Freeze for the Season*, PHILA. INQUIRER, Feb. 17, 2005, at SPORTS. The previous salary arbitration system favored the players, so they were reluctant to approve any significant changes to arbitration. However, the bigger picture of a salary cap appeared to prevail by the end of the negotiations. Aaron Portzline, *Players Claim Owners Aren't in Such Bad Shape*, COLUMBUS DISPATCH, Feb. 6, 2005, at E7.

²⁸⁹ See NHL CBA, *supra* note 73, at art. 12, § 5(m). This provision stipulates that "the decision of the Arbitrator" must include "a brief statement of the reasons for the decision, including identification of any comparable(s) relied on." *Id.* However, the CBA does not further delineate this broad requirement, and parties cannot overturn arbitrators' decisions. *Id.*

²⁹⁰ See NHL CBA, *supra* note 73, at art. 12, § 5(m)(i)(D).

²⁹¹ See *id.* at art. 12, § 5(m)

²⁹² *Id.* (laying out the framework of the arbitrator's report, but providing no limit to the amount of the decision).

new CBA.²⁹³ The central failure of the old CBA was allowing the League's costs to grossly overshadow its revenues. With the new salary cap, the NHL has effectively gotten its labor costs under control.²⁹⁴ Salary arbitration will not yield the same damning effect as it did under the old CBA, because the salary cap will not allow owners to pay their players grossly inflated salaries. The NHL's new hard cap is even more restrictive than the MLB's soft cap; the new CBA prohibits NHL teams from exceeding the cap by paying a luxury tax, as the rich teams in baseball do.²⁹⁵ Next to eliminating salary arbitration altogether, the imposition of the hard salary cap was the most effective option available to the NHL to curtail arbitration's inflationary influence and to improve the League's financial viability.

V. CONCLUSION

A. *The Future of Salary Arbitration in the NHL*

In 2004, a record number of NHL players filed for arbitration.²⁹⁶ While it appears from these figures that salary arbitration is alive and well in the NHL, this observation overlooks the fact that the NHL itself is barely alive financially.²⁹⁷ The situation looks grim for the NHL. Despite the League's new rules of play and marketing strategy,²⁹⁸ the NHL's fan base will likely dissipate even more than it already has in the last decade due to the ill-will surrounding the 2004–05 lockout.²⁹⁹ Fans of baseball, America's game, had

²⁹³ See CBA FAQs, *supra* note 29.

²⁹⁴ Ian Wilson, *Brand-new Hockey Game: NHL Biz Brass Get Their Pucks in a Row*, CALGARY SUN (Alta., Can.), July 24, 2005, at BUSINESS 55.

²⁹⁵ See Hoynes, *supra* note 150, at S8. The New York Yankees have consistently blown through the MLB's salary cap and simply paid the multi-million dollar luxury tax to do so. *Id.* Pursuant to the new CBA, NHL teams will not be able to follow the Yankees' lead.

²⁹⁶ *Record Number of NHL Players File for Arbitration*, USA TODAY, July 16, 2004, at Hockey, http://www.usatoday.com/sports/hockey/nhl/2004-07-16-arbitration_x.htm.

²⁹⁷ Damien Cox, *Future of NHL Remains Cloudy, Unsure*, TORONTO STAR, Feb. 4, 2005, at E5 (Feb. 6, 2005) (calling the future of the NHL a "bleak frontier").

²⁹⁸ See Elliott, *supra* note 5, at D1; Tucker, *supra* note 7, at 1E. "Suffice to say it's going to take a lot more than a new logo to market the post-lockout NHL." *Id.*

²⁹⁹ Cf. Wilson, *supra* note 294, at BUSINESS 55 (stating that "[a]nalysts agree hockey's fan base, predominantly in Canada, will return to the game"). These "analysts" peachy prediction overlooks the fact that, as of the beginning of the 2005–06 season, the NHL had only six Canadian franchises out of the League's total of thirty. While it is indisputable that hockey is "Canada's game," the fans of the other twenty-four teams will likely not be quite so loyal.

a hard time trusting the MLB after it cancelled the end of the 1994 season.³⁰⁰ It is difficult to predict exactly how hockey fans will react in the long run to the cancelled season of 2004–05.³⁰¹ One thing is for sure: without NHL fans, there can be no NHL.³⁰²

The NHL's woes are much larger than just revamping the salary arbitration system. League-fan relations, player-owner relations, poor business decisions, and several other problems—some of which the NHL and NHLPA addressed with the new CBA—require serious attention from the NHL.³⁰³ When the NHL and NHLPA initially negotiated during the lockout of 2004–05, the two sides' focus on a salary cap overshadowed the need for

³⁰⁰ Matt Hitt, *NHL Committing Suicide with Cancelled Season*, ROCKY MOUNTAIN COLLEGIAN (Fort Collins, Co.), Feb. 28, 2005. After the cancellation of the 1994 World Series, baseball fans were "furious," and "attendance and TV ratings plummeted the next year." *Id.*

³⁰¹ After the baseball players association's strike cancelled the remainder of the 1994 MLB season, the MLB lost a large portion of its fan base. See David J. Neal, *Season Nearly Dead*, MIAMI HERALD, Jan. 11, 2005, at C7 (recalling baseball "fans' savage anger that erupted when the major-league baseball players' strike [of 1994] scuttled the World Series" and speculating that the 1994 strike perhaps "killed . . . a franchise's [the Expos's] future in Montreal"). In 2004 after years of declining attendance and increasing financial difficulty, the Expos moved to Washington, D.C. and became the Washington Nationals. Ed Waldman, *Baseball is Back on Track in D.C.*, BALTIMORE SUN, Dec. 22, 2004, at 1A (giving a detailed, three-year timeline of the relocation and re-appellation of the Expos). Hockey, however, has benefited from "disturbingly loyal fans." Cf. Farber, *supra* note 276, at 63. "After a 103-day lockout in 1994–95, attendance for the subsequent 48-game schedule improved by more than 1000 fans per game over the previous season." *Id.* One media outlet has commented that "as long as there is a Canada, hockey will survive." *Rev Up the Zamboni*, *supra* note 4, at A20.

³⁰² In an open letter to fans of hockey, Commissioner Gary Bettman recognized that the lockout required "a lot of sacrifice by a lot of people—including you [the fans]." Gary Bettman, Open Letter to Hockey Fans (July 22, 2005), available at <http://view.ed4.net/v/0ZN1Z/ENXI/R339Z5/V1PUYE/>. Bettman also noted that fan support is the lifeblood of the NHL and apologized to the fans "for testing that support as severely as we did." *Id.*

³⁰³ Bettman's letter to the fans is an obvious effort on behalf of the League to reach out to disgruntled fans. *Id.* The NHL is also seeking to bring back fans by increasing scoring and action in games. Tucker, *supra* note 7, at 1E. Only time will tell whether these strategies will work and whether the NHL will ever fully recover from the 2004–05 lockout. Owner-player relations may be permanently damaged by the lockout, as neither side can trust the other at this point. As of the end of the 2004–05 lockout and the announcement of the new CBA, the NHL had not published any plans to constrict the number of teams in the League or to move franchises back to colder and more hockey-friendly locations.

changing salary arbitration.³⁰⁴ Eventually, the two sides recognized that many areas of the League's business model needed altering, and the new salary cap is the best step the NHL took to ensure its future.³⁰⁵ The salary cap will effectively eliminate salary arbitration's damning effects on the financial vitality of the League.

Under the new CBA, salary arbitration will become obsolete. The attractiveness of arbitration under the old CBA was the absence of a limitation on the amount that arbitrators could award. The upward spiral had no ceiling. However, with a hard salary cap the whole system changes. Each year, the CBA will allow teams to spend a limited amount on their players' salaries. The focus of the negotiations of each off-season will be "cap room"—the amount that each team can spend on salaries and still obey the CBA's ceiling. Since the hockey off-season begins in June and arbitrations typically occur in the first two weeks of August, the players will have little or no incentive to use arbitration for increasing their salaries between seasons. By the time the League holds arbitrations, most—if not all—teams' cap room will have been dedicated to contract negotiations in June and July. By next season, few NHL players will resort to salary arbitration, and I predict that, eventually, the League will eliminate arbitration altogether.³⁰⁶ Future negotiations between the NHL and NHLPA will center on the players' share of League revenues and the level of the salary cap.³⁰⁷

³⁰⁴ See *Iced*, ST. LOUIS POST-DISPATCH, Sept. 17, 2004, at B10 (citing the reason for the lockout was that "the owners want to cap salaries"); see also Luke DeCock, *Digging In*, THE NEWS & OBSERVER (Raleigh, N.C.), Nov. 2, 2003, at C6 (citing that, almost a full year before the lockout began, the reason for a potential labor stoppage was the owners' desire to cap salaries); Alan Snel, *Lightning's New Ads Announce 'Hockey Bay, USA'*, TAMPA TRIB., July 24, 2004, at MONEYSENSE 1 (holding that the potential lockout would be the result of the "owners want[ing] to cap salaries").

³⁰⁵ Pierre Lebrun, *Ratify and Satisfy: Welcome to the Week of Lotteries, Group Meetings and CBA Revelations*, CALGARY SUN (Alta., Can.), July 19, 2005, at 39: Veteran agent Don Baizley described his skepticism of the NHL's future in the following manner: "We are in the sports world, so people want to declare winners and losers immediately. We will have theories on how this may work out but realistically, who really knows?" *Id.* He continued: "The hope is that in four or five years, instead of this [lockout] being a total catastrophe, maybe we'll be able to look back at this being a seminal event in the history of the game where it was a real turning point and we're all better off for it." *Id.*

³⁰⁶ The new CBA is scheduled to expire after the 2010–11 season. CBA FAQs, *supra* note 29.

³⁰⁷ The NFL's experience with salary caps and revenue sharing provides helpful insight into how the NHL's future will likely play out. For a discussion of recent NFL negotiations, see Tim Tucker, *Labor Talks: NHL Negotiating with Itself*, ATLANTA J.-CONST., Oct. 9, 2005, at 2F.

B. Will Major League Baseball Decline Like the NHL?

The salary explosions of the MLB and the NHL follow the same upward trajectory.³⁰⁸ Both leagues started using salary arbitration and free agency in the early 1970s.³⁰⁹ Since then, both leagues have experienced an exponential rise in the average and highest salaries of their respective players.³¹⁰ As the NHL has precipitously declined financially, however, the MLB has not also followed suit, and there is no indication that the MLB will experience the same melt-down that the NHL weathered in 2004–05.³¹¹

Although there are many reasons for this divergence, most explanations stem from baseball's popularity advantage.³¹² There are simply more baseball fans in North America than there are hockey fans.³¹³ The result of this difference is relatively higher revenue for the MLB,³¹⁴ which in turn gives the Major Leagues an ability to counter increasing player costs. The MLB can afford to pay unprecedented salaries, while the NHL lacks the ability to do so.³¹⁵

³⁰⁸ In 1994, the NHL's average salary was \$560,000, and by 2004, that number had grown to \$1.8 million. Loftus, *supra* note 54, at 47. In 1994, the average salary for the Major Leagues was \$1.54 million, and in 2004, that figure was \$2.49 million. Lindsay, *supra* note 137, at SPORTS. The highest salaries in those leagues rose in similar fashion as well. *Id.*

³⁰⁹ BERRY ET AL., *supra* note 91, at 209 (relating that the first NHL season with arbitration was 1970); STAUDOHAR, *supra* note 92, at 41 (showing that the MLB first included arbitration in its 1973 CBA).

³¹⁰ Lindsay, *supra* note 137, at SPORTS; Loftus, *supra* note 54, at 47.

³¹¹ See Richard Sandomir, *When It Comes to Sports on Television, NBC Favors a Smaller Ball*, N.Y. TIMES, Mar. 4, 2005, at D1 (citing NBC's recent success with baseball broadcasting, its decision to pay the NHL no money upfront in its most recent contract, and the relative success of the MLB); Tom Jones, *Compromise Now or Pay Later for Lockout*, ST. PETERSBURG TIMES (Fla.), Feb. 13, 2005, at 10C (claiming that "hockey has nowhere near the popularity of baseball").

³¹² Jones, *supra* note 311, at 10C (claiming that "hockey has no where near the popularity of baseball").

³¹³ A record-high 73,022,969 fans witnessed MLB games in 2004. See Kane, *supra* note 166, at 14B. The NHL's total attendance for 2004 was about 20 million, according to NHL Commissioner Gary Bettman. See DuPont, *supra* note 166, at C11.

³¹⁴ See Kulfan, *supra* note 8, at 6G. In 2004, the MLB had an estimated annual revenue of \$4.1 billion, while the NHL had half of that—\$2 billion. *Id.*

³¹⁵ While the MLB has an average salary (\$2.5 million) much higher than the NHL (\$1.8 million), the average team payroll in the MLB (\$68.1 million for twenty-five players) dwarfs the NHL's average team payroll (\$41.6 million for twenty-three players). See Kulfan, *supra* note 8, at 6G. However, the MLB has twice the annual revenues of the NHL, and only 63% of the MLB's revenues pay for player costs. *Id.* Player costs eat up about 75% of the NHL's revenues. *Id.*

Baseball's popularity and subsequent financial edge allow the MLB to continue to use a player-friendly arbitration system without suffering the consequences that the NHL has tried to endure.³¹⁶ While the procedural differences between the two league's arbitration systems do not translate into a varying effect on increasing salaries,³¹⁷ the MLB can adjust to those player cost increases better than the NHL can.³¹⁸ In effect, the results that arbitration has on salaries matter more in professional hockey, because those results have a greater impact on the financial stability of the League.

Although the MLB and the NHL both use a player-friendly arbitration system and the MLB has experienced player cost increases along with the NHL, the financial decline of the NHL will not readily manifest itself in the MLB. As long as baseball is "America's game," the MLB will have the resources to pay exorbitant salaries and continue to generate large revenues and impressive profits.³¹⁹ The main issue in the MLB is not excessive compensation, but the disparity between rich and poor teams.

C. Should Other Professional Sports Leagues Use Salary Arbitration?

The NHL and MLB have had salary arbitration since the early 1970s, while the NBA and NFL have never used salary arbitration.³²⁰ Because of their financial success, the NBA and NFL have not needed arbitration, and it would be illogical for either of those leagues to institute salary arbitration.

The NHL and MLB each began using salary arbitration *before* having a system of free agency.³²¹ The ownership in both leagues fought for years against free agency.³²² Before the point in time in which players finally had free agency, MLB and NHL owners conceded to the players on salary arbitration.³²³ A few years after each league introduced arbitration, free agency became the norm for both professional hockey and baseball.³²⁴

³¹⁶ *Id.*

³¹⁷ Both leagues have seen exponential increases in average and highest player salaries. Lindsay, *supra* note 137, at SPORTS; see Loftus, *supra* note 54, at 47.

³¹⁸ The MLB has the ability to pay for its extravagance. See Kulfan, *supra* note 8, at 6G (noting that the MLB's estimated annual revenue is \$4.1 billion, while the NHL's is half of that—\$2 billion).

³¹⁹ Tim O'Meilie, *The Bite of Spring*, PALM BEACH POST (Fla.), Mar. 4, 2005, at 1A.

³²⁰ See ABRAMS, *supra* note 91, at 146.

³²¹ BERRY ET AL., *supra* note 91, at 209; STAUDOHAR, *supra* note 92, at 41.

³²² *Id.*

³²³ *Id.*

³²⁴ The NHL introduced free agency in 1972, and the MLB did the same in 1975. BERRY ET AL., *supra* note 91, at 211; STAUDOHAR, *supra* note 92, at 41.

Neither league ever rescinded its arbitration system,³²⁵ although the players in those leagues did not need arbitration once free agency became available.³²⁶

When only the players may elect arbitration, salary arbitration is a player-friendly system. Only players can elect arbitration in the MLB and under the old NHL CBA,³²⁷ and players used the system to obtain higher salaries.³²⁸ If teams could elect to arbitrate players' salaries after those players had mediocre or bad years, salary arbitration could act as an effective means of adjusting salaries to a more realistic, up-to-the-year figure.³²⁹ This "two-way street" model, which the new NHL CBA utilizes to a limited extent, could make sense in the NBA and NFL. Teams could arbitrate to lower the salaries of underproductive players, while outstanding players could arbitrate for higher salaries. This system could be a tool for tweaking salaries to match the market.

Even this "two-way street" approach to salary arbitration is unnecessary in the NBA and NFL, though, because both leagues have effective systems of free agency.³³⁰ Free agency accomplishes roughly the same result as two-way street arbitration would. When players have the right to negotiate their contracts with other teams, players can agree to salaries that are set by the market, rather than by individual teams.³³¹ The NBA and NFL flourish under

³²⁵ To this day, salary arbitration and free agency exist simultaneously in both the NHL and MLB. See Kulfan, *supra* note 8, at 6G.

³²⁶ Players in both the NHL and MLB bargained for salary arbitration as a means of freeing up the market in those leagues. BERRY ET AL., *supra* note 91, at 209–12; STAUDOHAR, *supra* note 92, at 41–44. With the advent of free agency, the players' market is just that—free; as a result, the player-friendly arbitration system is not necessary.

³²⁷ While an MLB club must consent to arbitration in some circumstances, a club cannot use arbitration to lower a player's salary. 2003–2006 Basic Agreement between the MLB and MLBPA, *supra* note 107, at art. VI(F). In the NHL, the club has no power of consent. NHL CBA, *supra* note 73, at art. 12.

³²⁸ Since players have had the sole power to elect arbitration, they only file for arbitration when doing so will increase their pay. For instance, none of the 2004 NHL arbitrations resulted in a decreased player salary. See 2004 Arbitration Cases, *supra* note 215.

³²⁹ This is why the owners of the NHL fought for changes to salary arbitration. Bob Foltman, *Rebirth Rumors Add Up to Zero: NHL's Second-Chance Talks Lead Nowhere*, CHI. TRIB., Feb. 20, 2005, at C1.

³³⁰ The NFL instituted free agency for the first time in 1993. *Cornerbacks Pick Off Biggest Pay Increases of Any Position*, *supra* note 162, at C8. The first year of free agency in the NBA was 1976. BERRY ET AL., *supra* note 91, at 173.

³³¹ See Pete Dougherty, *Packers Aren't in the Red, but at \$10 Million over Next Year's Salary Cap, They Face Some Tough Decisions About the Roster*, GREEN BAY

their current free agency systems,³³² and salary arbitration in those leagues is unnecessary.

D. *Whither the NHL?*

The fate of the NHL is murky at best, although the end of the 2004–05 lockout and the League's rule changes should help spark some fan interest.³³³ In the wake of a potentially fatal financial decline,³³⁴ changing the rules of salary arbitration was but one element that the NHL needed to address in its lockout negotiations with the NHLPA.³³⁵ The NHL has taken steps to update its business model to reflect more accurately the demand for its product, but it remains to be seen whether these changes are enough to get the League back on solid ice.³³⁶

While the new changes to game play rules seem radical to long-time, die-hard hockey fans,³³⁷ the League missed an opportunity to institute a groundbreaking business model with the CBA. The new salary cap represents a much-needed improvement to the NHL's business system, but the NHL could have improved its financial situation significantly by eliminating some

PRESS-GAZETTE (Wisc.), Nov. 12, 2000, at 1K, *available at* LEXIS, News Library, GRPGAZ File (referring to the professional sports free agency system as an "open market" for the players).

³³² The NFL is the most successful professional sports league ever, with annual revenues topping \$5 billion. *See* Kulfan, *supra* note 8, at 6G. The NBA grosses over \$3 billion per year. *Id.* Most importantly, though, the NBA enjoys the lowest relative player costs of all the four major professional leagues, while the NFL is close behind the NBA and MLB. *Id.* This is partly due to the inherent nature of basketball and football, as the NBA has an average team size of twelve players, while the NFL's average team has fifty-three players. *Id.*

³³³ For a "doomsday" analysis of the NHL see Sherry Ross, *NHL's Life is Hardly 'Wonderful'*, DAILY NEWS (N.Y.), Jan. 11, 2005, at 71.

³³⁴ *See* Farber, *supra* note 276, at 60 (noting the NHL's fatal direction over the past few years).

³³⁵ At this point, the NHL is considering everything, including changing the style of uniforms, to improve its situation. *Id.* at 62.

³³⁶ *See* Elliott, *supra* note 5, at D1. The new CBA sets salary caps and floors on all teams, and links League revenue with player salaries. *Id.*

³³⁷ Al Strachan, *Rulebook Overhauled: Shootouts Highlight a Radical New Look*, TORONTO SUN, July 23, 2005, at S4. The elimination of the two-line pass rule, for instance, may change game play considerably. *Id.*; *see also* *On-Ice Transformation in Play: Lockout Over, NHL Owners Approve Labour Deal and Look to Relaunch Game*, THE RECORD (Kitchener-Waterloo, Ont., Can.), July 23, 2004, at E4, *available at* LEXIS, News Library, KWREC File. (noting that "[f]or the NHL, these are radical [rule] changes").

of the franchises that operate most poorly.³³⁸ Given the recent distress of the League, the NHL could have perhaps stood more drastic changes to its business model.³³⁹ The next several seasons will prove whether or not the new CBA is effective.

All of these ideas were worthless, however, without a basic agreement between the players and the owners.³⁴⁰ By finally reaching *some* agreement in mid-July, the NHL and NHLPA—at least temporarily—set the League back on track to playing again.³⁴¹ While both sides attempted to wait the other out and gain support from the fans during the lockout of 2004–05,³⁴² the result of the parties' obstinacy was overt frustration from the fans³⁴³ and the first cancellation of an entire North American professional sports season due to labor disagreements.³⁴⁴ Future seasons will reveal whether the NHL and NHLPA learned any lasting lessons from the lockout of 2004–05. Certainly one such message must be that fans suffer, and neither the players nor the owners win, when there is no major professional hockey league in operation.

³³⁸ The NHL could cut the Buffalo Sabres and the Ottawa Senators, both of which recently filed for bankruptcy. Joe Lapointe, *Labor Strife Was Not Part of Bettman's Bold Vision for NHL*, INT'L HERALD TRIB. (Paris, Fr.), Dec. 28, 2004, at SPORTS 19 (citing the relocation of teams and their negative impact on the League's finances); Allen, *supra* note 30; *Sports FYI: Solich Names Assistants*, *supra* note 35, at B2. The League could also eliminate the franchises that moved to warm climates and failed financially.

³³⁹ Two weeks after the NHL cancelled its 2004–05 season, an American company offered to buy the entire NHL—all thirty teams—for \$3.5 billion. Tim Tucker, *NHL Hears Bid for Buyout: Icy Reception: Offer to Buy League's 30 Teams and Run Them as One Company Unlikely to be Accepted*, ATLANTA J.-CONST., Mar. 4, 2005, at 1E.

³⁴⁰ See Terence Moore, *NHL: Expansion, then Implosion*, ATLANTA J.-CONST., Feb. 17, 2005, at 10D.

³⁴¹ *It's a New Ice Age with this NHL Labour Deal*, BROCKVILLE RECORDER & TIMES (Ont., Can.), July 22, 2005, at B1. Both the players and owners recognized the need to get the game back on the ice. *Id.* "It's time to move forward," said Philadelphia Flyers player Keith Primeau, "We can't drag our feet any longer." *Id.*

³⁴² Terry Frei, *Both Sides Show Unified Fronts: NHL Owners Give Support to Commissioner Bettman, Who Plans to Invite the Union for More Talks*, DENVER POST, Mar. 2, 2005, at D-13.

³⁴³ Ted Kulfan, *Former Players Put on a Show: Wings, Leafs Old-timers Hit the Ice, Join Fans in Lockout Disappointment*, THE DETROIT NEWS, Feb. 13, 2005, at 13C (quoting former Detroit player Marcel Dionne saying that "[t]he fans are frustrated, especially when you consider all the money that's involved"). Fans have a hard time being sympathetic to quarrelling millionaires and billionaires. Randy Sportak, *Season Quite Locked Up: Negotiations Create False Hope of Saving Current Campaign*, CALGARY SUN (Alta., Can.), Jan. 24, 2005, at S2 (noting that "[i]t's sickening to listen to a millionaire whine about not making more money").

³⁴⁴ Foltman, *supra* note 329, at C1.

